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Wills Speak

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INTRODUCTION

Legal maxims tend to calcify, a phenomenon that may be particularly acute within the slow-to-change property arena. All "must surely know," for example, such things as that *no one is heir to the living*,[1] *the law abhors a forfeiture*,[2] and *restraints on alienation are disfavored*.[3] That these maxims appear to be as venerable as they are common further entrenches the perceived wisdom and indelibility of each. Moreover, as is presumably true of most sayings, they seem to work most of the time.[4]

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1 In other words, "*[n]emo est hæres viventis*." *See, e.g.*, Basset & Morgan v. Manxel, (1567) 75 Eng. Rep. 835 (Court of King's Bench) [840]; Stevenson's Heirs v. Sullivant, 18 U.S. 207, 222 (1820); SIR EDWARD COKE, COMMENTARY UPON LITTLETON 8 (Charles Butler ed., Legal Classics Library 18th ed. 1985) (1628). "Even in these modern days, the ancient legal maxim *nemo est haeres viventis* is still applicable." Giano v. Salvatore, 46 A.3d 996, 1002 (Conn. App. Ct. 2012) (citation omitted) (disagreeing that release operating against an individual "and his heirs" would protect a putative heir to that still-living individual's estate).

2 *See, e.g.*, Doe v. Gladwin (1845) 115 Eng. Rep. 359 (Court of Queen's Bench) [362]; UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 370 (1999), Smith v. JPMorgan Chase Bank, Nat'l Ass'n, 825 F. Supp. 2d 859, 863 (S.D. Tex. 2011) ("It is axiomatic that in Texas, along with other jurisdictions, the law abhors a forfeiture."); Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 614 (2003); Herman F. Selvin, *Comment: Terror in Probate*, 16 STAN. L. REV. 355, 358 n.18 (1964) ("It is a hoary legal cliché, still retaining vitality, that the law abhors a forfeiture.").

3 *See, e.g.*, Jane B. Baron, *Property as Control: The Case of Information*, 18 MICH. TELECOMM. & TECH. L. REV. 367, 370 (2012); Stricklin v. Fortuna Energy Inc., No. 5:12CV8, 2012 WL 1805305, at *4 (N.D. W. Va. May 17, 2012); Davis v. Davis, 791 S.E.2d 714, 715–17 (N.C. Ct. App. 2016) (refusing to limit life tenant's right to execute short-term lease of vacation property notwithstanding tenant's self-imposition of restraint within gift deed conveying a remainder to her children); Bragdon v. Carter, No. 17CA3791, 2017 WL 4712455, at *1 (Ohio Ct. App. Oct. 18, 2017) (rejecting construction of will that would create a valid restraint on the alienation of a fee).

4 Otherwise, they wouldn't have reached the status of "sayings" rather than, for example, "something that someone once said."

One nevertheless might question their prescriptive versus descriptive value. It may be unclear whether a legal saying was ever or remains "real law," or instead that at some point, its iteration and confident reiteration have alchemized a usually useful shortcut into something much more. Such may be the case for the notion that "no will speaks until the death of its maker."[5] Where inertia bests wisdom or truth, danger rests in the retelling.[6]

Along with its *nemo est* cousin, the maxim that "no will speaks before death" initially seems benign. With little fuss, any testator[7] can destroy any will,[8] at any time.[9] Given such cheap and easy access to revocation or change, and of a document creating little (if anything) in those whom it names, the pre-death silence of wills therefore presents as uncontroversial if not sacrosanct. Moreover, the received wisdom serves both intent and efficiency, equally well. Testators need not fear a later reversal of mind, heart, or circumstance if they can easily change their wills at will, and curbing others' reliance on an inherently mutable document avoids the contention that could surface were actual entitlements in beneficiaries thought to arise upon a will's

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[5] "For where a testament is, there must also of necessity be the death of the testator." *Paul* 9:16, (King James). And that appears to be as true in 2020 as it was in 1900 and before. *See, e.g.*, Ware's Lessee v. Fisher, 2 Yeats 578, 585 (1800) ("[A] will speaks not till the death of the party . . . ."); Walker v. Walker, No. 14-16-00357-CV, 2017 WL 1181359, at *5 n.5 (Tex. App. Mar. 30, 2017) ("A will speaks only 'at the time of the testator's death[.]'").

[6] Joe Queenan highlights: "If one is neither a lender nor a borrower," he observes, "one probably cannot buy a house." He continues:

> It does not take one to know one: One does not need to be a coldblooded killer to recognize a serial killer, because the chain saw is a dead giveaway. What goes around does not always come around; lots of things go around once, and that is the end of it. Just ask the Poles, the Afghans or the Sioux.
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> . . . Words can hurt you, every bit as much as sticks and stones. "Only time will tell" is not true; we still don't know why Mick Taylor quit the Rolling Stones. There is no such thing as uncharted waters. You may not have the chart on hand . . . , but the charts exist. Google them.

Joe Queenan, *Joe Queenan on Maxims and Why They Are Never True*, WALL ST. J. (Nov. 26, 2014), https://www.wsj.com/articles/joe-queenan-on-maxims-and-why-they-are-never-true-1417027963[https://perma.cc/E5NG-SET4].

[7] At least one with capacity.

[8] Assuming capacity, there is traditionally no such thing as an "irrevocable will." Wills that have been validated via ante-mortem probate may still be revoked. *See, e.g.*, Susan G. Thatch, *Ante-Mortem Probate in New Jersey-an Idea Resurrected?*, 39 SETON HALL LEGIS. J. 331, 353–54 (2015). Joint or mutual wills do not generally give rise to enforceable will contracts, and even those that expressly create them may be revoked too, although breach will thereby occur. *See, e.g.*, *In re* Estate of Stuchlik, 857 N.W.2d 57, 67 (Neb. 2014), *opinion modified on denial of reh'g*, 861 N.W.2d 682 (Neb. 2015); THOMAS E. ATKINSON, HANDBOOK ON THE LAW OF WILLS § 49, at 224 (2d ed. 1953). Were irrevocable wills recognized, executing one would convert highly contingent future transfers into irrevocable present ones, tantamount to a grantor's conveyance of a remainder (and possible rights to sue for waste) to the beneficiaries while retaining the far-lesser life estate.

[9] Again, assuming capacity and statutorily appropriate acts.

execution. As such, it would be neither a will's writing nor valid execution that gives it voice, but rather, its survival and acceptance into probate, after the death of its author. Until so "spoken to," it does not—cannot—speak, and assuredly never yet has—almost as though it were not even there. Obviously, no will in fact speaks, and the maxim is also a metaphor. Nevertheless, this account of its mute and meaningless pre-death existence is misleading and incomplete.[10]

Expectancies do not equal property, no matter how fervently wished.[11] Instead, they are "'merely potential' and can 'evaporate in a moment at the whim of [another].'"[12] Part I briefly recounts that this much appears still to be true. But whatever resignation to or enthusiasm for the position that might exist, buy-in does not render pre-death wills meaningless. Although wills might not speak until death *as conveyance*,[13] a more modest claim may be made and defended: they often speak well before then, simply to different things. They are messages sent to a time

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[10] Consider Child X, silenced or neutralized. That others might be unable to hear what X says or feel permitted to listen (much less bound to comport), does not render X irrelevant to daily realities or even grand schemes. X might still be seen, even if not heard; speak, even if not spoken to, whether or not listened to. X's mere presence, and even existence, mean *something*. Such is the case with the pre-death will. There is irony in the analogy. Like maxims, analogy and metaphor invite interpretive and other risks. *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). A key difference, however, is that no matter how powerful an aid to understanding, metaphors and similes are more readily recognizable for the conceptual symbolism that they are, whereas the average maxim literally reads like a holding (or at least *dicta*) and can be reified into actual law through the disposition of a given case. When it does, it can construct a cage as easily as a bridge.

[11] The representation partly turns on such words as "title," "property," and "ownership," definitions for which are not always clear. Stated differently, it may be that if property is properly viewed not as "things" but as "rights" in things (which are divisible, always relative, and never absolute), and if, therefore, such rights equal property, and if wills create expectancies and expectancies confer rights (albeit limited or fragile), then perhaps wills create and confer rights, and expectancies are in fact property—at least in the non-specific, non-physical/tangible senses of the word, however relative, non-absolute, and divisible they may be. *See generally* Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1554–59 (1982) (discussing the thing-rights based conceptions embedded within the metaphor of property's bundle of sticks).

[12] Barefoot v. Jennings, 237 Cal. Rptr. 3d 750, 753 (Ct. App. 2018) (quoting *In re* Estate of Giraldin, 55 Cal. 4th 1058, 1065–66 (2012)), *rev'd and remanded*, 257 Cal. Rptr. 3d 629 (2020).

[13] This was not always the case. The early English common law regarded the will as quasi-conveyance, under which wills would not cover real property that testator had not yet owned at execution. ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION 27–28 (1928). Relatedly (but slightly inverted), for at least some period of time, an owner may have been barred from making inter vivos gifts of land to others than the heir apparent. SIMES & SMITH, THE LAW OF FUTURE INTERESTS 12–13 (Borron ed. 3d Ed. 2002).

we cannot see.[14] What is (and perhaps more shockingly) more, they can often confer rights.

Part II explores how a duly executed will (or even failed attempt) can hold legal consequence long before its maker dies and expectancies vest. As such, "nascent" wills actually do have much to say, and rightly so, which is a reality that underdetermined internalization of the "no will speaks" conclusion may have obscured. For no matter how attractive and understandable the maxim may on the surface appear, complexity rests uneasily at depth.

From one view, and much like the legal world within which it operates, the maxim reflects an either/or, all or nothing choice between then and now, now and later, and there or here. Missing the possibility for nuance implicitly casts pre-death wills as precatory nothing-scraps, setting them as the opposite of a matured post-death and operant conveyance. As Part III speculates, that take makes sense given the allure of binaries, including legal divisions between that which is property and that which is not. But from a different perspective, the phrase "no will yet speaks" also reveals a transitional potential to account, perhaps even legally, for some middle time and ground *between* then, now, later, here, and there. For example, promise theory suggests profound difference between intent to do X, no intent (or the absence of formed intent) to do X, and intent *not* to do X.[15] Similar consideration might benefit wills theory, particularly if the mere execution of the particular document given the legal name "Will" can be understood as generating at least some sort of promise or at least manifest intent of its maker—some alteration in position, some immediate, interim or ongoing "voice"—changeable and re-changeable though it may be.[16] The suggestion that attested wills are implicitly re-

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[14] *See* NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD XI (1982).

[15] The difference might be posed as between positive intent regarding action (e.g., "I intend to write a will"), positive intent regarding inaction/negative intent regarding action ("I intend to not write a will"; "I do not intend to write a will"), and no intent either way ("I haven't thought enough about the issue to form any intent at all.") The first two examples above reflect specific intent to do, or not do, something, which says something about both the person and that person's explicit, recognized, desires. The last example, far more diffuse, is "non-intent": "[b]efore reading this sentence, you probably neither intended to go up onto the roof and balance a chair on your forehead nor intended *not* to—the idea simply hadn't occurred to you." For a similar example, see ROBERT SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS AND ESTATES 79 (10th Ed. 2017) ("[I]f you are interested in whether a severed head retains feeling and consciousness for a few moments after severance . . . ."). *See also* IAN AYRES & GREGORY KLASS, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT 23 (2005) (highlighting these and other such undertheorized differences, and their potential effect on such things as contract claims and remedies).

[16] For example, some have found implied intent in the "decision" against will-making on the theory that the decedent knew of the default intestacy rules, and by inaction implicitly selected them. *See, e.g.*, Jeffrey A. Cooper, *In Defense of* Friedman*: A Reply to*

endorsed (much like codicils) each day or moment that they are not revoked effectively asserts as much.[17] A decision not to speak is itself a form of speech, and "choosing not to decide" remains, at bottom, a choice.

If nascent wills do indeed hold consequence even before death renders them irrevocable, Part III further posits that acknowledging these rarely observed effects might illuminate some hidden structure of testamentary intent and the peculiar wishful thinking termed the "expectancy" that its expression creates. True, theoretical distinction exists between the notion that expectancies themselves actually constitute property and the reality that a will might hold some intended or unintended consequences by its mere (but always intentional) execution. Nevertheless, the conceptual overlap is clear. If an executed will holds even a scintilla of present effect, then the notion that a beneficiary named within it might in turn "hold" something more than two birds in the bush and nothing yet in hand becomes far less ridiculous. Indeed, perhaps the refusal to countenance the second proposition partly explains the fervor of the first. Either way, revisiting both conundrums might clarify each and inform the ongoing development of a more contextually fluctuant understanding of property and the many physical, temporal, proportional, conceptual, and adaptable ways that its components can be severed and spliced.

I. WILLS, DEEDS & MAXIMS, AND THE ROUGH STATUS QUO

"If wishes were horses, beggars would ride"

Maxims become maxims for a reason.[18] Because there seems to be a necessary and stark divide between what is

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Professor Guzman, 42 AM. C. TR. & EST. COUNSEL L.J. 227, 231 (2016) ("It's . . . fundamental that a decedent is presumed to know the law and failure to negate a default rule represents tacit approval."); *In re* Shubert's Will, 180 N.E.2d 410, 416 (N.Y. 1962) (noting "[t]he testator is presumed to know the law" and "presumed to have intended" default law when he failed to provide otherwise). Tracking that perspective, one might ask whether there is (or should be) positional distinction, in terms of property rights, evidence, standing, or anything else, between having no will at all, having made a conscious choice to validly execute a will, and having continued to live thereafter with (or without) that will intact.

[17] *See, e.g.*, Jacobs v. Pinkston, 121 P.2d 996, 997 (Okla. 1942) (supporting death-time transfer of after-acquired property by theorizing that will "is considered to be republished each day of its existence [] unless and until revoked[] ").

[18] It does, however, seem that for every such saying, there is a contrary "is" and "ought." For example, although "rolling stones gather no moss" and "haste makes waste" where one "repents at leisure," it is also the early bird who catches the worm, and the bold whom fortune favors. As Shailer Matthews purportedly said, "an epigram is a half-truth so stated as to irritate the person who believes the other half." THE WORDSWORTH DICTIONARY OF QUOTATIONS 268 (3d ed. 1998). Like beauty, then, truth may be in the eye of the beholder.

property and what is not, there is also rough consensus over the accuracy and utility of the perceived pre-death silence of the will.

From the perspective of law, property is far less about physical things than some set of divisible, limited, and relative rights to them (such as to exclude or convey).[19] Nevertheless, the non-legal view of property is typified by a single owner having all rights to a single thing both now and later, at least up until the time that it is given, taken, or sold. Ann today owns the car, and Bob, the house; that buyers or foreclosers might tomorrow has little to do with today. Especially where the right of possession is actually being exercised and visible to all, Ann's property seems clearly hers to use or lose. She has no ownership status to wait for, having already arrived.

Accepting momentarily that demarcation exists between things and rights, along with that which is property and that which is not, contrast property with diametrical thinking on the expectancy. "[I]t has long been the law of this state that mere expectancies are not 'property' in the ordinary meaning of the term . . . ."[20] Whereas property is rooted in deed, expectancies hover in thought. Deeds are acts; wills are intents. Deeds transfer now to owners; wills, later, to hopers. By its root term and through its legal usage, an expectancy may be a possibility hoped for, fervently awaited, or even legitimately anticipated.[21] Nevertheless, the testate or intestate expectancy does not yet exist, at least in the world of things. More technically, it is an interest in "[t]he condition of being deferred to a future time, or of dependence upon an expected event"[22]; it is "mere[] potential" that rests on a "whim."[23] Whereas property is a presently protectable right—one that will be enforced by law today, in the

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[19] There is a circular quality to the legal definition of property. One could say that "X is my property; therefore, I have the right to convey it and exclude others therefrom." Contrarily, another could say "because I have the right to convey it and exclude others therefrom, X is my property." *See* SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I. 31 (2d ed. 1889) ("[The course of our law of possession] is not circular, but spiral; it never comes back to quite the same point as that from which it started. This play of reasoning between right and remedy fixes the use of the words.").

[20] *In re* Marriage of Githens, 204 P.3d 835, 836 (Or. Ct. App. 2009).

[21] Expectations might be "legitimate" (thus more likely protectable) in the privacy context, distinct or reasonable and "investment-backed" (thus more likely protectable) in the takings context, reasonably anticipated (thus more likely protectable) in the contract context; "vested" (thus more likely protectable) in the developer/permitting context. *See, e.g.*, Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 106–09 (1995).

[22] *Expectancy*, BLACK'S LAW DICTIONARY 686 (4th ed. 1968).

[23] Barefoot v. Jennings, 237 Cal. Rptr. 3d 750, 752–53 (Ct. App. 2018) (quoting *In re* Estate of Giraldin, 55 Cal. 4th 1058, 1065–66 (2012)), *rev'd and remanded*, 257 Cal. Rptr. 3d 629 (2020).

here and now—an expectancy is not an existing property interest, either present or future.[24]

If expectancies and property are indeed mutually exclusive, then death is the trigger on a zero-sum game before which, whether before or after having executed a will, the Testator's status as "true owner" remains. Testator may possess Blackacre, use it and exclude others (including Beneficiary) from it, lose it on a bet, transfer it to a friend or a charity, for compensation or without. Testator may live there or not, consume natural resources or not, sell options or not—all unlimited by any supposed interest in Beneficiary to do a single thing about it. Before Testator's death changes everything, Beneficiary is thought to have no interest in Blackacre at all.

Scores of doctrines reinforce these principles. Beneficiaries generally cannot challenge or control the use or disposition of estate property while the testator remains alive,[25] earning the right to demand receipt of assets upon Testator's death but not a moment before.[26] Settlors may not fund a trust with expectancies from another's estate.[27] Like anticipated

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[24] *See, e.g.*, *In re* Karim, 582 B.R. 193, 199, 199 n.15 (Bankr. N.D. Ill. 2018) ("[B]y all traditional and *current concepts* of property, expectancies are not property interests . . . ." (citations omitted)); *In re* Marriage of Githens, 204 P.3d 835, 836 (Or. Ct. App. 2009) ("[I]t has long been the law of this state that mere expectancies are not 'property' in the ordinary meaning of the term . . . ."); AUSTIN WAKEMAN SCOTT &WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 86.1 (4th ed. 1987); GEORGE T. BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 113 (2019) (noting that expectancies cannot be used to fund a trust because they are not property).

[25] Pragmatically, doing so could result in disinheritance anyway. Note, however, the increasing "proxy rights" afforded to guardians and conservators over the property rights of their wards. For example, in 2008 both the freestanding Uniform Guardianship and Protected Persons Act and the Uniform Probate Code (UPC) (of which it is a part) were amended explicitly to permit conservators to make wills for their conservatees. *See* UNIF. PROBATE CODE § 5-407(b)(3) (UNIF. LAW COMM'N 2008); UNIF. GUARDIANSHIP AND PROTECTED PERSONS ACT § 2-307 (3) (UNIF. LAW COMM'N 2008). By statute, California requires that absent good cause to dispense with it, notice of the petition for the conservator's initial appointment and of certain subsequent actions be given to the conservatee's known heirs or beneficiaries under any document "which may have testamentary effect." CAL. PROB. CODE § 2581 (c)–(d). With such expansion can be expected a trend toward permitting will beneficiaries to challenge or at least be given notice of such actions, even while the ward/testator remains alive. For example, in *Murphy v. Murphy*, 78 Cal. Rptr. 3d 784 (Cal. Ct. App. 2008), the court barred son/beneficiary's attempt, post-father's death, to challenge pre-death estate modification made by father's conservator. Under the traditional view, son was correct to wait for father to die and expectancies to vest before challenging subsequent will. But the son, said the court, was too late. *Id.* at 809.

[26] It is commonly asserted that a beneficial interest in a will does not vest until the testator's death. *See, e.g.*, Drye v. United States, 528 U.S. 49, 61 (1999) (holding upon decedent's death, heir held "control rein" that qualified as "property" or "rights to property" under meaning of federal tax law); *In re* Guardianship of Barnhart, 859 N.W.2d 856, 865 (2015) (discussing who has standing to challenge the appointment of a conservator).

[27] *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS §§ 40–41 & 41 cmts. a–b (AM. LAW. INST. 2003); Rose v. Waldrip, 730 S.E.2d 529, 535 (Ga. Ct. App. 2012) ("[I]f a person . . . purports to declare himself presently trustee of property [that he hopes to acquire in the future] . . . , no trust arises even when he acquires the property in the

winnings at lotto, that interest remains inchoate, not yet attributable to the beneficiary or capable of supplying the sole res until it actually comes into existence. Promises unsupported by consideration are unenforceable,[28] and no inter vivos gift is made until the donor feels the wrench of delivery and thus demonstrates intent to the world.[29] Once crossing that point, gift givers lose takebacks and contractors shouldn't breach. But until they turn into decedents, Testators can still change their minds.

There is much to be said for this mindset, and related perceptions of deeds versus wills, from intent and efficiency quarters. Close to two-thirds of the population does not have a will, an already-high percentage that often increases depending on the demographics of the denominator population.[30] The low incidence of will-making partially stems from fear.[31] Would-be testators fearing mortality might view will execution as a self-fulfilling prophecy; those fearing decision, as threat; those fearing commitment, constraint. By externalizing intent through conduct, the word "deed" reveals past tense by action; something having already, irretrievably, been "done."[32] To equate a will to a deed by removing the right to revoke, which might be thought a necessary correlative to denying all pre-death rights to its beneficiaries or

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absence of a manifestation of intention at that time" (second alteration in original) (citing RESTATEMENT (SECOND) OF TRUSTS § 86 cmt. c (AM. LAW INST. 1957))); Karras v. Karras, 76 N.E.3d 706, 713–14 (Ohio Ct. App. 2016).

[28] The proposition hardly needs citation. For one example of statutory support, see GA. CODE ANN. § 13-3-1 (valid contracts require competent parties, assent, subject matter, and "a consideration moving to the contract"). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (reiterating the traditional offer, acceptance, and consideration formula).

[29] Although "[t]he essentials of an enforceable gift [which are intent, delivery, and acceptance] have not changed in centuries," EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 9:21 (2d ed. 2013), delivery has sometimes collapsed from an independent requirement into an evidentiary subset of intent. *See, e.g.*, Katheleen R. Guzman, *Dependent Disclaimers*, 42 AM. C. TR. & EST. COUNSEL L.J. 159, 159 (2016); Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 344–45 (2011) [hereinafter Guzman, *Intents and Purposes*] (critiquing the view of wills as nothing but gifts, deferred); Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 819 (2014).

[30] *See* Dorianne Perrucci, *Business Reporters: Why Don't More Americans Have Wills?*, BUS. JOURNALISM (Nov. 6, 2018), https://businessjournalism.org/2018/11/business-reporters-tackle-this-personal-finance-challenge/ [https://perma.cc/SA47-3L8L].

[31] *See, e.g.*, John Astrachan, *Why People Don't Make Wills*, TR. & EST., Apr. 1979, at 45 (providing a psychiatrist's explanation of the high percentage of intestate death). Generally, those who do not make wills either are not capable of doing so due to age or capacity factors, or they are capable, but do not know that they can or think that they must. At least just yet.

[32] "Ordinary language philosophy" suggests that ordinary language explains ordinary thinking (and presumably, vice-versa). *See, e.g.*, AVNER BAZ, WHEN WORDS ARE CALLED FOR: A DEFENSE OF ORDINARY LANGUAGE PHILOSOPHY 2 (2012); OSWALD HANFLING, PHILOSOPHY AND ORDINARY LANGUAGE: THE BENT AND GENIUS OF OUR TONGUE (2000); SAUNDRA LAUGIER, WHY WE NEED ORDINARY LANGUAGE PHILOSOPHY (2013).

lifetime meaning to its terms, could paralyze otherwise interested will-makers,[33] dropping already low execution rates[34] still lower and disserving testamentary goals.[35]

The posture of the will mitigates these concerns, again in sync with the shared understandings that inhere in the relevant terms. By contrast to "done deeds" and the property interests they create, the word "will" is akin to the word "expectancy" in suggesting wish, plan or desire—some changeable mental "location" via intent and its forward-looking role in deferred and changeable actuation.[36] Even the fiercest commitment to an asserted unchangeable plan might yield to later reversal of fact or fortune. Therefore, it is both useful and comforting for the law to reinforce that as lives or minds change, so can wills, and with minimal cost. Safe in the knowledge that they can revoke, testators retain autonomy and decisional control.

Broader benefits accrue from the nascency of wills. Were they actually to transfer all interests, they would pauperize their makers, shifting to public shoulders the cost of a private testamentary act. Wills are instead deemed to convey nothing. As such, those who transact with either still-living testators or their putative beneficiaries may safely avoid the information and transaction costs—who has what rights relative to whom, and when—that more ambiguous signals would otherwise generate.[37]

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[33] The phenomena of indecision paralysis, and buyer's remorse are well recognized, and find legal support (and relief) through such avenues as a cooling-off period during which a buyer has a period of time within which to unwind a deal. For example, Illinois state law requires that borrowers under reverse mortgage loans be afforded an additional three days within which to reconsider their decision, which cannot be waived. 75 ILL. COMP. STAT. ANN. 945/20.

[34] *See, e.g.*, David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 627 (2015) (reporting a 40 percent intestacy rate from the administration and probate records studied); Alyssa R. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographics Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (reporting that 68 percent of survey respondents had not yet executed a will). As Professor Emily S. Taylor Poppe notes, such data presumably overreports the incidence of will-making. Emily S. Taylor Poppe, *The Future Is ~~Bright~~ Complicated: AI, Apps & Access to Justice*, 72 OKLA. L. REV. 185, 197–98 (2019). *See generally infra* note 31 (discussing psychological explanations for estate planning avoidance).

[35] If true that one who could not change her mind would not make a will, it should also be true that the ability to change a will promotes more will-making, and thus the expression of testamentary intent and freedom that law encourages.

[36] *See supra* note 31 and accompanying text.

[37] Questions could include whether the relevant party had or was a beneficiary under a will, the validity of the will, the will's susceptibility to challenge and the likelihood of success thereon, the breadth, terms, and meaning of the will, and the effect of disclaimers. All of these questions would be difficult to answer, particularly given that the contents of wills are normally not known, nor are wills normally filed or recorded, until death. Wills, which often contain secrets, are generally private instruments. Contrast deeds, liens, trusts, mortgages, and other types of lifetime instruments affecting real estate. Priority battles between competing claimants to the same parcel turn on time, value, and notice interplays, under which the rights of bona fide purchasers (rather than testamentary donees) and the operation of the recording acts make recordation critical to place the world on notice of the

If the death of the testator thus flips a master switch—an irrevocable and comprehensive conclusion to the life and the rights of the testator, and a corresponding acquisition of rights by surviving takers—then the maxim that "no will speaks until the death of its maker" works. This should surprise no one. "A metaphor is a filter and a metaphor is a lens."[38]

Part of the inherent benefit of using metaphor and analogy across theories is locating common ground from which to extrapolate something new.

> A memorable metaphor has the power to bring two separate domains into cognitive and emotional relation by using language directly appropriate to the one as a lens for seeing the other; the implications, suggestions, and supporting values entwined with the literal use of the metaphorical expression enable us to see a new subject matter in a new way. The extended meanings that result, the relations between initially disparate realms created, can neither be antecedently predicted nor subsequently paraphrased in prose. We can comment *upon* the metaphor, but the metaphor itself neither needs nor invites explanation and paraphrase. Metaphorical thought is a distinctive mode of achieving insight, not to be construed as an ornamental substitute for plain thought.[39]

Maxims work similarly. The more longstanding and pervasive they are, the more they suggest their own "practice makes perfect" and "tried and true" efficiencies. One need not reinvent wheels or "build better mousetraps" when all of the old ones will do. But by definition, analogies only work up to a point. Progress (or at least change, which is not necessarily progress) on any front, legal or otherwise, is difficult where the systems—often represented by the maxims—of the past unquestioningly govern the future.[40]

This is the case where the pre-death silence of wills is concerned. The idea that "no will speaks until the death of its maker" is true in some circles, at least insofar, as earlier described, the conventional transfer of conventionally

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asserted claim. *See, e.g.*, US Bank N.A. v. Mallory, 982 A.2d 986, 994 n.6 (Pa. Super. Ct. 2009) ("Mortgages are recorded to provide notice to the world as to whose interest encumbers title."); Kalange v. Rencher, 30 P.3d 970, 974 (Idaho 2001) ("The primary purpose of the recording statutes is to give notice to others that an interest is claimed in real property. The design of the recording statutes compels the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title.").

[38] Winter, *supra* note 10, at 1516 n.68 (quoting MAX BLACK, MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY 39–41 (1962)).

[39] *Id.* at 1567 n.67 (quoting BLACK, *supra* note 38, at 236–37).

[40] "[T]he master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change." Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* THIS BRIDGE CALLED MY BACK, 98, 99 (Cherríe Moraga & Gloria Anzaldúa eds., 2d ed. 1983) (emphasis omitted).

understood property rights is concerned.[41] Nevertheless, the phrase "some circles" significantly qualifies the maxim's platonic truth. As later explored, other principles reveal that as both over- and under-inclusive, the rule is demonstrably false. As such, although the maxim might hasten comprehension of (or at least work no immediate harm on) well-accepted principles of ownership, its reflexive invocation discourages questioning its truth or utility, dampens opportunity for dialogue over alternative theoretical possibilities, and impedes the potential for creative, rational, and possibly superior legal responses to given sets of facts.

Of course no will literally speaks, at any point in time.[42] That is a piece of poetic license obviously understood as such. But to use the very language of the metaphor to disprove it, nor do all wills speak at death.[43] Far more critically, most "speak" well before, and in legally meaningful ways. To the traditionalist, that might sound like apostasy. Others might say "why not."[44]

II. WILLS SPEAK UPON EXECUTION

The trouble with the saying that "no will speaks until the death of its maker" is that it can be read in different ways and at different times to make it true or false. For example, if "to

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[41] For example, a Tennessee statute makes this point clearly, seemingly taking care to limit its reach to traditional questions of construction and conveyance:

> A will shall be *construed* . . . to speak and take effect as if it had been executed immediately before the death of the testator, and shall *convey* all the real estate belonging to the testator, or in which the testator had any interest *at the testator's decease*, unless a contrary intention appears by its words in context.

TENN. CODE ANN. § 32-3-101 (emphasis added); *see also In re* Estate of Kowalski, 574 S.W.3d 872, 877 (Tenn. Ct. App. 2018) (quoting same).

[42] Just as "no one glows." Matters may change, however, if and as electronic records such as audiotape come to be accepted as valid wills similarly to their contractual counterparts.

[43] For example, consider a valid will that expressly disinherits all descendants, conveys everything to the spouse (who ends up predeceasing the testator), provides that everything is to go to a stepchild in the event that decedent and spouse die "in a common disaster" (which they do not), contains no residuary clause, and is probated in a jurisdiction that does not give effect to the so-called "negative will clause." In the traditional sense, the will not speak at all. The estate will pass to the very heirs that the decedent attempted to disinherit through the valid will, in absolute contravention to the decedent's explicit intent. This example is based on *In re Estate of Baxter*, 827 P.2d 184 (Okla. Ct. App. 1992).

[44] One may neutrally recognize that wills have possible legal effect without (a) stating that they transfer legal title or (b) endorsing that reality or its downstream implications. The more important point is that asking "why not" forces consideration of the question and the pros and cons of each answer, and perhaps reveals alternate possibilities beyond the status quo. If you "shoot for the moon, you might reach the stars." After all, "a man's reach must exceed his grasp, or what's a meta[for]?" MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 83 (Terrence Gordon ed., Gingko Press Critical ed. 2003) (1964).

speak" means "to convey property," the saying is conventionally true, with Part I having just detailed why. But as it also means "to reveal" or even "have effect," the saying misinforms.

Will-writing is an expressive, communicative, and quasi-performative act. As Section A below observes, the very fact that one is willing to set pen to paper to externalize thought via document reveals some intents (or beliefs) about some matters, even if misleading (or mistaken) ones, and even if only short-lived. More critically, Part III reveals how doctrine has sometimes turned the intent suggested by will-making patterns into virtual per se rules, elevating into law some de facto effects of the pre-death will in the process. The real role that wills may hold immediately upon execution (and sometimes, even before) is something that the expansion, repetition, and internalization of the maxim seems to have mostly obscured.

A. Intent and the Individual Testator: Execution as Expression, Conduct, and Evidence

1. Intent Actuation: Communication of Intent in the Present

Will drafting is poignant in translating one's vision about what the world might look like with "an absent self" into a present document seeking to immortalize how desired person/property relationships might play out. Wills are "human documents in which men give away themselves"[45]; "[t]estators . . . do not merely arrange for their possessions to be managed and distributed after they die. They also do something else: they make a statement. Testation is a form of speech."[46]

For an individual testator, contemplating the terms of a will encourages perspective on priorities and reinforces impermanence and mortality. The mere act of drafting therefore represents communication with self, even where much of the work ends up mediated through attorney/client conversation. By inviting legal ceremonial into the mix through further (and paid for—in time and perhaps, money) action, the will's formal execution heightens its expressivity, and represents the testator's essential declaration to

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[45] Harry Hibschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932). Professor Karen Sneddon, who authored the piece where I first encountered the quote, writes about the expressive function of wills with thoughtfulness, insight, and analytic care. *See* Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 359 (2013); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683 (2011).

[46] David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 65 (2012) (emphasis omitted).

the witnesses and to the world: "I stand behind this statement of my will. These are truly my wishes as I now see them."[47] Moreover, will terms can be written with an eye toward affecting, inducing, or controlling the subsequent behavior of others, innocently or otherwise, and will encompass the testator's "preferences, decisions, and personality, [and possibly] reflect[] the recipients' gratitude, disappointment, remembrance, and, hopefully, respect for the giver's choice and wishes."[48]

From this view, both the will and its speech may start off being less about content than process and statement, with the executed will providing little more than a snapshot of motivation in time. Nevertheless, through the will, testamentary freedom and intent coalesce. The testator's then-present intent to create it is perfectly proven—not later, when the will is found unrevoked, but at the very instant it is made.

2. Intent Construction: Interpretation of the Will's Intent in a Past-Looking Future

The stance of the will eases some drafting and interpretive burdens while generating others. Contracts demand counterparties, thus agreement, knowledge, and expressive clarity. These virtues are lost in the will context. Their donative nature means that there is only one intent—that of the testator—that must be captured. Neither its execution nor terms will necessarily be known by others, including beneficiaries within it. Having transferred no interest, testators are not vulnerable to "breach of will"; neither duty nor risk must be managed.[49]

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[47] *See, e.g.*, Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 590 (2016) ("[C]ompliance with . . . formalities provides robust evidence that the decedent intended the document to constitute a legally effective expression of testamentary intent."). This perspective is heightened in jurisdictions that continue to require "publication," or the testator's communication to the witnesses, by word or by conduct, that the document they are witnessing is her will. It is always possible that a testator will execute (but not actually intend) a particular document with a covert purpose in mind. *See, e.g.*, Fleming v. Morrison, 72 N.E. 499, 499 (Mass. 1904) (will purportedly designed to induce beneficiary into sexual relationship with testator). Moreover, because wills can be revoked just as soon as they're drafted, that intent admittedly may be short-lived. But at least outside of the sham will context, and distinct from contracts or other promises insincerely made from the start, wills sincerely convey the "then-present version" of what their authors then intend to have happen on death. To that end, they may reveal much more about the inner-workings of the testator's mind, motive, purpose, or belief than many other pieces of evidence capable of use as proof. For more on this possibility from a contractual perspective, see AYRES & KLASS, *supra* note 15.

[48] Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 979 (2010).

[49] Careful drafting is critical where, e.g., with real estate contracts or mortgages, rights and duties turn on mutual understanding and specific expression of both parties' agreement.

Moreover, the time horizon of gifts and contracts differs from wills. That gifts generally require both delivery and acceptance, and cannot be undone once complete, generates earlier appreciation for the immediacy of the conduct on both giving and receiving ends. This forces more deliberative care in offer and acceptance and reduces interpretive risk over the object of the transfer.[50] Contracts also tend toward more immediate internalization than the will, rarely intending long-deferred (much less posthumous) performance, and less susceptible to the evidentiary hazards of a memory fade or key witness's death.[51] By contrast, wills are specifically designed for post-death significance, an event that most testators wish long to defer, and at which point they will escape its consequence. Effects of their use are externalized. Although wills should mean what their makers meant them to mean, appreciable time might elapse between the day they are drafted and the day they are read.[52] When a will is read, the testator has usually died, along with the key to its construction. That plight has been amply developed.[53] and the maxim might offer some cure.

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[50] For more on the theory of gifts versus wills, see Guzman, *Intents and Purposes*, *supra* note 29, at 344–46 (exploring the importance but elusiveness of testamentary intent).

[51] Exceptions exist, such as long-term installment sales contracts or generous call options. Even where the executory interval between contract and closing is short, one or the other party could die in the interim before performance is complete. Nevertheless, unlike wills, these sorts of agreements are generally not negotiated within a death-relevant framework. And while possible, will contracts are rare, and the mere execution of a joint or mutual will is generally insufficient to create one. *See, e.g.*, Long v. Waggoner, 558 S.E.2d 380, 383 (Ga. 2002) (requiring an express statement of contractual intent).

[52] Stale wills are not invalid, simply harder to construe. Even deathbed wills can generate interpretive difficulty, particularly when they are lost after the decedent's death, where no deadline is imposed on their probate, or where such deadline might be excused. *See, e.g.*, Ferreira v. Butler, 531 S.W.3d 337, 338, 340 (Tex. Ct. App. 2017) (discussing TEX. EST. CODE ANN. § 256.003(a), requiring that wills be probated within four years of the testator's death "unless it is shown by proof that *the applicant* for the probate of the will was *not in default* in failing to present the will"), *vacated by* 531 S.W.3d 331 (Tex. 2019); N.C. GEN. STAT. ANN. § 28A-2A-1 ("Any executor named in a will may, *at any time after the death of the testator*, apply to the clerk of the superior court, having jurisdiction, to have the will admitted to probate." (emphasis added)).

[53] As Professor Adam Hirsch notes upon observing the early prevalence of (and peril in) deathbed wills:

> [E]very silver lining has its cloud. Wills drafted in the prime of life implicate a different peril—the risk of being overtaken by events. If a hiatus separates the time when a will is executed from the time when it matures, intervening occurrences . . . may render it less well adapted to his or her subsequent circumstances [and thus less well reflective of the testator's intent].

Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 611 (2009). Or as the Restatement notes, "There will always be some interval between the execution of a will and the testator's death. The interval is sometimes long, sometimes short. Older wills . . . are just as valid as 'fresher' ones, but have the potential to do mischief." RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 5, intro. note (AM. LAW

A few interpretive possibilities arise. Law could despair of the difficulty of discerning the intent of decedents and send an ambiguous clause to the residuary or intestate succession[54]; impose a "then-time" construction,[55] unwinding the clock to see where matters stood on the date of execution; or read the will in the relative "now" by presuming Testator meant for a death-time construction.[56] The last approach aligns with the maxim such that insofar as interpretation is concerned, the "speech" of the will is death-deferred unless specifically clarified otherwise.[57] Indeed, the conception and construction of class gifts, after-acquired property, and residual clauses reveal this to be so in a way that permits interpretive blanks to be filled, in likely consonance with intent.[58] However, the second approach is occasionally used, at least where clear or for certain discrete purposes, again supporting the will's speech as an aid to construction at the time that it was made rather than the time at which it is read.[59] Where

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INST. 1999); *see* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1138–46 (2015). *See generally* Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221 (2018).

[54] *See, e.g.*, ATKINSON, *supra* note 8, at 813 (noting when the testator's intention is non-existent or not discernible, "[a] conceivable solution would be that the provisions of such wills should fail for indefiniteness").

[55] *See id.* at 810 ("[I]t is practically agreed that the court is permitted to consider the circumstances surrounding the testator at the time of execution of the will to determine his meaning.").

[56] *See id.* at 815, 815 n.50 (observing the rule of construction "that wills speak at death," although noting at least some case law exempting attempts to discern specific property or identify specific beneficiaries, which would implicate, e.g., ademption by satisfaction). Note that Professor Atkinson takes care to differentiate interpretation from construction. The former involves the process of "discovering the meaning or intention of the testator from permissible data." *Id.* at 809. The latter is essentially the application of evidentiary presumptions and is only necessary when the former fails. *Id.* at 809–10, 816.

[57] Classes open and close, shrink and expand. And residuary clauses must have a death-time construction, or how will we know what is "left"? What and to whom will change, and things are bought or spent and people are born or die. For example, where a will states "house to wife, car to sister, and the rest of my property to my nephews," and two years later the testator trades his old car for a new one, wins the lottery, gets divorced and remarried, and celebrates his sister's third child just before death, the will is usually given a death-time construction under which new spouse gets the house, sister gets the new car, and three nephews rather than two split much more than the testator initially had to give.

[58] The same might be said of related wills concepts, e.g., ademption by extinction or satisfaction (where, by the time of death, the testator no longer owns the subject matter of the earlier bequest or devise). It seems, therefore, that a time of death construction within this particular arena grew out of a desire to avoid ademption by extinction or satisfaction, as well as sidestep the older rule prohibiting the transfer, to a beneficiary, of after-acquired real property. *See, e.g.*, Atwood's Heirs v. Beck, 21 Ala. 590 (1852).

[59] For example, contrast a specific will clause either identifying spouse, car, and nephews (e.g., "my red Ferrari to my spouse, A, and the rest to my nephews, B and C") or noting particular times at which determinations are to be made (e.g., "the car I now own to the spouse I now have," or "the car I own at my death to whomever then qualifies as a nephew"). Even that language might be unclear, depending on whether the word "now" refers to the date of the will's execution, or the date that it takes effect. *See Word "Now" or Other Word of Time in Will as Relating to Date of Execution of Will or Date of Death of Testator*, 125 A.L.R. 790 (1940). Case law often differentiates on distinctions that can be difficult to draw or square. *See, e.g.*, Roll v. Newhall, 888 N.W.2d

so, and although such interpretive questions always arise within an odd now/then/now posture, the will speaks immediately upon execution as to its own terms. Relatedly, where the will attempts to incorporate an external document by reference, the external document must be read as it existed at the execution of the will. Unless statutorily permitted, the external document may not thereafter be altered or amended without the "new terms" losing testamentary effect, which freezes at least that portion of the will into that which existed at the precise time of execution.[60]

3. Evidence, Pre- or Post- Execution and Death, About Non-Testamentary Things

The last two sub-sections discussed how a will, although not capable of pre-death, instrumental use as an actual title conveyance, nevertheless speaks "internally" by revealing its maker's state of mind at its making[61] or the likely meaning that should later be afforded the words earlier employed. What is often forgotten, however, is that wills—indeed, whether valid or not or probated or not—are also documents and can be used as evidence beyond some self-referential construction to generate results in the outside world. Considered slightly differently, a valid will requires both testamentary intent and a legally compliant act. Those two factors, while adding up to a valid will, continue to exist apart from their joinder as well. Acts matter all the time to law, especially those that involve signed writings that speak to thoughts or to facts. Acts can also be used as evidence.

For example, non-marital children are occasionally permitted to establish paternity through the alleged parent's

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422, 426 (Iowa 2016) ("Although the effect of a will's language is determined at the date of the testator's death, the intended meaning of the language used is 'construed as of the date of its execution.'"); *In re* Estate of Thompson, 164 N.W.2d 141, 145 (Iowa 1969) (stating a will "speaks as of the date of death, but is interpreted as of the date of its execution"; for after-acquired property to pass requires intent both clear and specific); *In re* Estate of Robinson, 280 P.2d 676, 677 (Wash. 1955) (notwithstanding later speech, "intention of the testator is determined" at execution).

[60] *See, e.g.*, Cyfers v. Cyfers, 759 S.E.2d 475, 483 (W. Va. 2014) (refusing to permit incorporation where evidence revealed that at least one change was made to the extrinsic document after the date of execution, and that attorney could not identify which of the others had been contained therein at the date of execution). By republishing and reexecuting wills to their later date, codicils thus often rescue incorporation from invalidity. Note that the Uniform Testamentary Additions to Trusts Act is more flexible, permitting wills to pour over into trusts even when they were amended, or not even existing as of the date of the will's execution, without requiring that the conduct satisfy the common law elements for either incorporation by reference or acts with independent significance. Uniform Testamentary Additions to Trusts Act, Natl. Conference of Commissioners on Uniform State Laws § 1 (1991).

[61] *See, e.g.*, Farmer v. Associated Professors of Loyola Coll., 171 A. 361, 364, 368 (Md. 1934) (employing will to establish naturalness of gift).

signed and witnessed writing.[62] If so, where a biological father's attempted will acknowledges a non-marital child's status, but fails technical statutory compliance, the invalid will could still serve to qualify the non-marital child as intestate heir. Perhaps any legal determination that requires a signed and witnessed writing can be met by a will immediately upon its execution, without waiting for its maker to die.[63] The same might be said of any determination that requires a signed writing whether witnessed or not, or perhaps any writing at all.

The use of the will in this way is tricky. Perhaps law should be leery of ascribing evidential value to a document with an inherently mutable quality,[64] as a will assuredly is. Moreover, if its maker remains alive (and capacitated), and unless fraud or some other nefariousness is afoot, the safer course would be to collect direct evidence from the individual having made the will rather than from some document that individual sometime earlier had made. Nevertheless, no evidence is perfect, and any arguable, alleged intent—whether sourced to a will or elsewhere—can change.[65] Moreover, law repeatedly privileges the combination of acts plus intents by recognizing that the former proves up the latter as well as demonstrates it to the world.[66] The evidence (e.g., paternity, motive, belief, state of mind) revealed by an intentionally signed and/or witnessed and notarized writing (which generally describes the will) seems qualitatively superior to that which can be gathered from less formal writings or no writings at all, such as where motive or intent is inferred from

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[62] *See, e.g.*, OKLA. STAT. ANN. tit. 84, § 215.

[63] Attested wills must generally be written, signed, and witnessed; holographic wills, written and signed. Thus, for example, and depending on the facts, even an invalid or unexecuted will could serve as a writing signed by the party to be charged under the Statute of Frauds, or a statement revealing the intent to make an advancement for an alteration to the intestacy scheme, or as evidence of motive to support an exception to the Federal Rule of Evidence 404(b) (hearsay) to prove a particular crime.

[64] As wills law consistently reminds, wills are ambulatory and can be changed at any time by any testator who retains capacity. *See, e.g.*, Maeker v. Ross, 99 A.3d 795, 805 (N.J. 2014) ("A will, by its very nature, is a revocable instrument, and therefore, without more, cannot be the basis for a binding palimony agreement.").

[65] Thus, for example, intending to commit a crime (mens rea) is usually not a crime unless some criminal act is connected thereto.

[66] The thinking is that talk is cheap until actors put their money where their mouth is. For example, gifts generally require both donative intent plus delivery; wills generally require both testamentary intent plus statutorily compliant execution; revocations generally require both revocatory intent plus statutorily compliant revocation; abandonments generally require both intent to abandon plus an objective, demonstrable act. Relatedly, mere acts often generate a *presumption* of some underlying intent (as where the recordation of deed is presumed to reveal its delivery to the named grantee) or do not turn on any specifically formed intent (as with adverse possession or trespass). Obviously, then, acts alone (such as the execution of a will) matter, and these examples do not even begin to touch related contract, tort, or criminal law analogies. *See* Guzman, *Intents and Purposes*, *supra* note 29 (detailing intent in these and other contexts).

fact or circumstance. Thus, wills have evidentiary effect either apart from or perhaps even due to their documentary status.[67]

III. WILLS SPEAK UPON EXECUTION THROUGH RIGHTS

Taken alone, none of the "extra" uses of the will before death as described in Part II seems controversial, although they may have been overlooked given the pedestaled, "no effect until . . . death" way in which the will is often perceived.[68] But their recognition reveals the heresy: the power of the pre-death will to invite others to inhabit the testator's mind, and its use to communicate, illuminate, or establish. It thus seems that the many ways that wills actually speak early are hiding before our very eyes.

But that is not the half of it. Wills also speak early by fixing (at times, irrefutably) the presumed intent of their makers, so much so that it seems that their mere execution does actually confer rights, even if not technically to "property." Two such arenas are highlighted below. In both, legal doctrine is ready and willing to superimpose efficiency and policy atop the intent expressed in the will, thereby shifting analysis from the testator's subjective hope or mindset to some existing legal doctrine that may or may not wrestle overtly with intent. So again, if wills don't speak before the death of their makers, but if "to speak" means "to generate legal effect," the maxim protests too much, both within will-specific arenas and beyond.

A. Inchoate Standing to Contest: Looking Forward from Execution

Standing is slippery, with a terminological usage that slides between structural limitations on the power of courts[69] or observations about real parties in interest and the merits of a particular, supportable claim.[70] Although it has been cast as a

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[67] For additional examples: see Byrd v. Riggs, 100 S.E.2d 453, 458 (Ga. 1957) (allowing use of will for signature comparison on challenged deed); *see also* Citizens' Nat'l Bank v. Custis, 138 A. 261, 265–66 (Md. 1927) (using will as evidence of signatures on challenged note).

[68] *In re* Tr. of Spencer, 825 N.W.2d 753, 758 (Minn. Ct. App. 2012) (stating will has no purpose and no effect until after death).

[69] As now-Chief Justice Roberts wrote a quarter-century ago, "the Supreme Court for some time has recognized standing as a constitutionally based doctrine designed to implement the Framers' concept of 'the proper—and properly limited—role of the courts in a democratic society.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) (internal citations omitted).

[70] As one court has stated,

> The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable

litigation-producing quagmire, intuitions of fairness and efficiency inherent in its "core intuition that plaintiffs must have some special connection to the subject matter of the dispute, as opposed to a generalized interest in law enforcement or public policy."[71] This need for skin in the game means that plaintiffs who hold a "mere expectancy" versus a "real and substantial interest"[72] are routinely denied the right to do many things, such as seek compensation for takings[73] or sue to recover property.[74] But a more subtle question asks whether they may challenge the very sorts of later documents that had earlier created them,[75] with an answer that invites wills to speak much more loudly at execution than the maxim would have us believe.

Before turning to that discussion, a preliminary observation about wills and standing must be made. Wills are ambulatory, changeable until death. Timing marries standing to facts; both are jurisprudential concerns. If no claim is ripe until harm has been suffered, then no beneficiary under any will has standing proper to challenge anything—including "their own" or later wills—until the testator dies and its terms are in play.[76] Nevertheless, to recognize some "inchoate standing," arising at time X (execution) and continuing (even if not "prosecutable")

> right, title, or interest in the subject matter of the controversy. The purpose of the real party in interest inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.

In re Tr. of Bresel, No. A-14-922, 2016 WL 1359097, at *16 (Neb. Ct. App. Apr. 5, 2016) (emphasis added) (internal citations omitted).

[71] Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1505 (2008) (proposing a geographically-based assessment for federal environmental litigation).

[72] Commonwealth *ex rel.* Beshear v. Commonwealth Office of the Governor *ex rel.* Bevin, 498 S.W.3d 355, 383–84 (Ky. 2016) (Venters, J., dissenting).

[73] Takings plaintiffs "must initially show standing, including . . . the requisite interest in the property at issue . . . . [i.e.,] ownership at the time of the alleged taking by the Government[,] . . . grounded in a legally enforceable right—not in an expectancy." First Hartford Corp. Pension Plan & Tr. v. United States, 42 Fed. Cl. 599, 617 (1998) (refusing to find sufficient ownership interest to support takings claim against the Federal Deposit Insurance Company), *aff'd in part*, *rev'd in part and remanded*, 194 F.3d 1279 (Fed. Cir. 1999). The principle should not suggest that no court has ever reframed a plaintiff's expectancy as the ancestor's "right to transfer," or recharacterized that interest as conferring third-party standing to bring the claim. *See, e.g.*, Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 615–16 (2000) (discussing forced escheat legislation as effecting a taking of the right to devise).

[74] *See, e.g.*, *In re* Tr. of Bresel, 2016 WL 1359097, at *16 (plaintiff lacked ability to recover property conveyed by living, incapacitated settlor).

[75] Of course, ante-mortem probate offers putative will beneficiaries certain rights during the testator's life, as do statutory schemes enhancing rights and protections where incapacitated testators exist. *See infra* note 82 and accompanying text (discussing ante-mortem probate). *See generally* Katheleen Guzman, *Persons and Things in the Bardo* (working draft on file with author).

[76] For example, a beneficiary under a first will who is upset by the term of a second might become glad again to learn of a third if the third re-ups the terms of the first.

until used or lost at time Y (death), is conceptually distinct.[77] Although the term's usage might not perfectly fit, it is to this latter sense of standing that I here try to speak.

The concept of the will as subjective in content but standard in form powerfully serves collectivist as well as individualist concerns, with those who choose to make them undertaking expressive acts in a manner that courts find familiar and beneficiaries will accept.[78] At least in terms of the value of intent, however, it is primarily the testamentary freedom actuated by the testator's will that the law seeks most to protect, rather than judicial efficiency or any opportunistic, foolish, or even innocent and reasoned expectation of some hopeful beneficiary or heir.[79] As such, and much as the rules of civil procedure in general are designed to further justice while curbing costs,[80] the doctrine of standing as employed within decedents' estates seeks that only those with a legitimate and sufficiently individualized interest in the outcome of the proceeding will litigate a duly-executed will.

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[77] A few analogies are suggested, although none perfectly capture the time paradox involved in the will. Vested remainders subject to divestment are future interests that may or may not ripen into possession. They are weaker than indefeasibly vested remainders, but sturdier than contingent ones. Nevertheless, the present rights they confer are curtailed given the relative evanescence of their future. Expectancy interests can be released to their source while they are inchoate or disclaimed post-death once vested. *See generally* D. Benjamin Barros, *Toward A Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 16–17 (2009). Although disclaimers "relate back" to the date of the decedent's death, the mere right to decide (or "dominion") whether to accept or disclaim (or "channel") has been called "property" or "rights to property" to which a federal tax lien can attach. Drye v. United States, 528 U.S. 49, 51 (1999).

[78] *See, e.g.*, John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 3 (1987) (observing that along with the well-recognized protective, cautionary, and evidentiary functions of formalities, standardization lowers costs and makes probate routine); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493–94 (1975) (same).

[79] *Cf.* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37 (1996) (asserting that judicial rhetoric notwithstanding, courts may be more committed to majoritarian norms than to upholding testamentary intent).

[80] *See, e.g.*, GENSLER, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY RULE 1. The analogy to civil procedure is imperfect. Will contests blend adversarial civil actions and procedural rules with quasi-administrative probate proceedings, ROSS & REED, *supra* note 29, § 1:2, with parties who are sometimes described as contestant and proponent and other times, plaintiff and defendant. *See, e.g.*, Lorie Sue Herman, *Will Contests*, 96 AM. JUR. TRIALS 343, §§ 68–69 (2005). Although valuable reform has occurred, probate is indicted as complex, time-consuming, and unnecessarily bureaucratic in a way not necessarily applicable to other litigation arenas.

1. The Traditional Will Contest

Wills are commonly challenged over testamentary incapacity, undue influence, and fraud.[81] The difficulties associated with such claims for all parties are obvious, particularly as they are usually brought against decedents, who can no longer defend the document as the free product of considered and competent deliberation.[82] To the probate bar, will contests are distasteful, "clash[ing] with the intention of probate practitioners to regularize and insulate the results of human death in a white coat of formal paperwork[,] and the orderly transition of accumulated wealth from generation to generation without publicity or onerous taxation."[83] Legislatures and courts react similarly, recognizing that constraining contests reduces the time, expense, and incidence of litigation, correlatively preserving estate assets and circling back to the most important aspect of the entire enterprise: protection of testamentary freedom, thus protection of the testator's intent.[84] Where "there are millions of probates per year, one-in-a-hundred

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[81] *See* Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 647–49 (1987).

[82] "Traditionally, a will could not be contested prior to the death of the testator because a will is ambulatory and does not speak until the testator's death, and a living person has no heirs with standing to bring a claim." Vivian L. Thoreen & Dana G. Fitzsimons Jr., *Elder Financial Abuse: Protecting the Aging Client from the Den of Thieves*, 46TH ANNUAL HECKERLING INST. ON EST. PLANNING, Jan. 2012. Nevertheless, ante-mortem (pre-death) probate provides an exception, through which individuals may establish and defend the enforceability of their estate plans (i.e., "validate" them), and presumably with a reduced challenge rate given the upsides of a superior evidentiary position and the downsides of arguing with a still-living testator. With its perceived benefits, however, comes pragmatic and theoretical criticism, which might explain why the Uniform Probate Code has rejected ante-mortem probate and why the approach is rarely used, even where accepted. *See, e.g.*, ALASKA STAT. ANN. § 13.12.530; ARK. CODE ANN. §§ 28-40-202 to -203; N.H. REV. STAT. ANN. § 564-B:4-406(d); N.C. GEN. STAT. ANN. §§ 28A-2B-1 to -6; N.D. CENT. CODE ANN. §§ 30.1-08.1-01 to -04. That said, the idea has not been abandoned, and legislation continues to be proposed. *See, e.g.*, Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 181–82 (1990) (recognizing its significant potential as a corrective to many probate ills); Susan G. Thatch, *Ante-Mortem Probate in New Jersey—An Idea Resurrected?*, 39 SETON HALL LEGIS. J. 331, 353–54 (2015) (noting that for certain testators, the gains of ante-mortem probate may well be worth its costs); Jacob Arthur Bradley, Comment, *Antemortem Probate Is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 MISS. L.J. 1431, 1478 (2016) (asserting that the rights of surviving family members should take precedence over the interests of the decedent); Kyle Frizzelle, Comment, *Better to Play Dead? Examining North Carolina's Living Probate Law and Its Potential Effect on Testamentary Disposition*, 39 CAMPBELL L. REV. 187, 193–96 (2017) (noting its inefficiency where the opportunity for post-mortem contests remains). For similar thoughts through a different approach, see Alex M. Johnson, Jr., *Is It Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393 (2016).

[83] ROSS & REED, *supra* note 29, § 1:1.

[84] Perhaps because it was often expressed as part of a confession or during last rites, testamentary intent assumed a sanctified status under early canon law so much so that interference with it threatened literal excommunication. R.H. HELMHOLZ, I THE OXFORD HISTORY OF THE LAWS OF ENGLAND 393–96 (2003).

litigation patterns are very serious."[85] Were they to realize how often their wills were challenged, testators would be appalled.[86]

Two means through which law caps the will contest are presumptions over capacity and the careful circumscription of proper plaintiff status. Wills duly executed or accepted for probate are often presumed to have been written by a competent and self-directed party,[87] shifting the burden to one "interested or sufficiently invested in" the will to press capacity or influence concerns.[88] As legislatively drawn and judicially developed, that phrase covers anyone who has "such a direct pecuniary interest in the devolution of a testator's estate that his interest would be impaired or defeated if the will were admitted to probate, or . . . benefitted if [admission were denied]."[89] Generally, that translates into an assurance of standing for one with something to lose, should a will stand, or gain, should a will fail. But however easily that standard may be stated, its application is more elusive, and confusingly turns on how much of an interest is "interest," and just how directly, direct.[90]

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[85] John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (book review).

[86] The rate will likely increase as America grays:

> The largest inter-generational transfer of wealth in the nation's history has started. Baby boomers holding that wealth are living longer due to improvements in medical science. With longer life comes increased needs and a larger window of exposure to dementia. Increasing needs and decreasing capacity provide fertile ground for financial abuse and intra-family fighting.

Dana G. Fitzsimons, Jr., *Guardianship Litigation and Pre-Death Will Contests Are On the Rise*, 36 EST. PLAN. 39 (2009). Additional exacerbating factors include a poor economic climate (encouraging contest by disappointed heirs); greater wealth passing through lifetime transfers and other will substitutes (rather than left in the decedent's estate); the continuing creation and complexity of blended families (depressing disincentives to sue); the acceleration of behaviorally-based limitations on heirship (as suggested by elder abuse and "bad parent" legislation), the increasing pressure on testamentary intent to rescue technically invalid wills (shifting litigation to intent-based questions like capacity and influence over formalities); and the heightened incidence of home-drawn wills (where ceremonial protections are not in place). *See, e.g.*, Ian M. Hull, *Contesting the Will: Why Are Inheritance Disputes on the Rise?*, HUFFINGTON POST (Sept. 23, 2013), https://www.huffingtonpost.ca/ian-m-hull/contest-will-inheritance_b_3643681.html [https://perma.cc/J86U-FCLU].

[87] *See, e.g.*, *In re* Estate of Quirin, 348 P.3d 658, 661 (Mont. 2015) (stating duly executed will offered into probate presumed to have been executed by one with capacity); ROSS & REED, *supra* note 29, § 6:13 ("Usually, the courts . . . state that a duly executed will is presumed to be free from any taint of lack of capacity or undue influence."); § 7:9 ("While only a handful of states have explicitly stated that a validly executed will is presumed to be free of undue influence, the presumption of validity obviously applies to undue influence cases as well as to testamentary capacity cases." (footnote omitted)); § 7.11 ("Most states hold that once the proponent has proved that the questioned will was duly executed with proper formalities, the burden of proof shifts to the contestant . . . .").

[88] ROSS & REED, *supra* note 29, §§ 3:1, 7:11 ("Most states hold that once the proponent has proved that the questioned will was duly executed with proper formalities, the burden of proof shifts to the contestant . . . .").

[89] Washington & Lee Univ. v. Dist. Ct. of Okla. Cty., Prob. Div., 492 P.2d 320, 324 (Okla. 1971).

[90] An intermediate Illinois court read that connection broadly:

Standing to contest is largely legislative, reflecting rough jurisdictional alignment over its parameters. Under state statutory regimes, those who are generally out are the sentimental,[91] the protective,[92] and "the merely meddlesome,"[93] whether related to the decedent or not. Questionable contestants include parties to a will contract, creditors, and fiduciaries;[94] different states have different rules. But those universally granted standing are litigants under an immediate "one challenge" binary reflecting antipodal choice. It is here that the potential for a will's effect upon execution rather than death begins to emerge. Were it true that everyone always had standing to challenge a will, then to hold beneficiary status would be meaningless; one so situated would be in precisely the same boat as everybody else, including strangers, vis-à-vis the will. But it is *not* true that everyone always has standing. Thus, that beneficiary status (once created) makes a difference means that the wills, once created, do too.

Where the claim is unattenuated, the contested will itself is all that stands between the contestant and the desired outcome. This is obvious where a disinherited heir challenges the first and only will.[95] If the will stands, the heir is out; if it

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> We do not find that [the heir's] interest is remote or otherwise nonexistent merely because she may be required to contest the 2001 will and three prior wills before she is entitled to succeed to the testator's estate. In terms of the right to take by intestacy, *each time a disinherited heir successfully challenges the validity of a will, that heir is thereby benefit[t]ed.*

In re Estate of Schlenker, 789 N.E.2d 456, 458 (Ill. App. Ct. 2003) (emphasis added), *aff'd*, 808 N.E.2d 995 (Ill. 2004). Compare the closer tie required by the court in *Jolley v. Henderson*, noting it "well-settled 'that before the appellant may go forward with a will contest he [or she] must show that he [or she] would take a share of the decedent's estate if *the probated will* were set aside.'" Jolley v. Henderson, 154 S.W.3d 538, 543 (Tenn. Ct. App. 2004) (alterations in original) (emphasis added) (quoting *In re* Estate of West, 729 S.W.2d 676, 677–78 (Tenn. Ct. App. 1987)). The *Schlenker* Court's expansiveness was assisted by the broad wording of its probate code, which conferred standing on any "interested person," including, "without limitation," an heir. 755 ILL. COMP. STAT. ANN. 5/1-2.11. *See infra* notes 100–120 and accompanying text (discussing the standing rights of heirs and beneficiaries against later removed wills).

[91] "An interest resting on sentiment or sympathy, or any other basis other than gain or loss of money or its equivalent, is insufficient." *In re* Estate of Lee, 551 S.W.3d 802, 809 (Tex. Ct. App. 2018) (internal citations omitted).

[92] *See, e.g.*, *In re* Duffy's Estate, 292 N.W. 165 (Iowa 1940).

[93] *Washington & Lee Univ.*, 492 P.2d at 324. The exclusion of whom "is axiomatic." *Id.*

[94] *See generally* WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES 546–47 (5th ed. 2017); 3 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 26.55 (administrators, executors, and trustees) (2004); *id.* § 26.58 (successors of would-be takers); *id.* § 26.60 (creditors).

[95] The choice is between Will #1 (the only will) and intestacy (or in the absence of heirs, escheat), and seems incontrovertible. If will contests are to be accepted at all, who better to bring one than the person cut out thereby? *See, e.g.*, ROSS & REED, *supra* note 29, §§ 3:2, 3:4 ("The typical list of individuals with standing to contest a will includes: heirs who would

fails, she is in. True, little about that scenario seems to say a thing about the effect of a pre-death will. But tellingly, this either/or-ness would also be true of any prior taker who contests the will just next,[96] whether it is a beneficiary under Will #1 who challenges Will #2 or a beneficiary under Will #9 who challenges the tenth. Each latter instance belies the truism that wills remain mute until the death of their makers, unless everyone has standing to challenge all others' estates—again, a claim that is simply wrong. Instead, Wills #1 and 9, respectively, speak legally so as to confer some inchoate standing on their own beneficiaries against the next beneficiary set. What is more, they do so immediately upon execution rather than at some later point.[97] Indeed, these rights arise whether the earlier will is

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gain by intestacy over the will . . . ."); *In re* Estates of Alexander, 622 P.2d 1091, 1092 (Okla. Ct. App. 1980); *In re* Estate of Luongo, 823 A.2d 942, 954 (Pa. Super. Ct. 2003) ("[H]eir-at-law has the right to be heard on the validity of a will, where there is no prior will, and the estate would pass by the laws of intestacy if the challenged will were declared invalid."). *See generally* Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1, 30 (2015) (noting that "[b]y defining who counts as a legal heir, [intestacy statutes] determine[ ] who has standing to challenge a decedent's will or to intervene in the probate of an estate"); Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, SY003 ALI-CLE 461, July 7–8 2016, at 4, Westlaw (recognizing the broad standing rights of heirs); Nancy J. Knauer, *"Gen Silent": Advocating for LGBT Elders*, 19 ELDER L.J. 289, 343 (2012) (same). Although limits exist, they largely turn on the ability of the heir/contestant to claim the underlying heirship status. *See, e.g.*, *In re* Ballmann's Will, 100 N.Y.S.2d 447 (Surr. Ct. 1950) (contestant would receive no more through intestate succession than bequest under contested will; potential inheritance from sibling whose estate would be enriched were contest successful deemed too speculative); *In re* Harjoche's Estate, 146 P.2d 130, 133 (Okla. 1944) (claimant who failed to prove status as child lacked standing to contest); *In re* Carothers' Estate, 150 A. 585, 586 (Pa. 1930) (even were will only partially invalidated, failed bequests would fall into the will's residuary clause rather than pass to putative heirs).

[96] The choice is now, e.g., between Will #1 and Will #2. See, e.g., *In re Estate of Schumann*, 67 N.E.3d 365, 372 (Ill. App. Ct. 2016), where in finding that a prior will's beneficiary held standing to challenge a subsequent one, the court explicitly distinguished cases where other, intervening wills existed. As the court clarified, "[as] no other obstacle prevented [the prior will beneficiaries] from immediately seeking to probate" the prior will, the contestants have sufficient "'direct, pecuniary, existing interest' in their will contest that [claimants in other cases lacked.]" *Id.* Again, the proposition is uncontroversial, even if the means of getting there is, occasionally, not: if the later will is successfully challenged, it should be as though it had never been made; if not, then the first will was never revoked, and thus is in no need of revival. *See, e.g.*, *In re Estate of Luongo*, 823 A.2d at 954. *See generally* ROSS & REED, *supra* note 29, § 3:5. Contrast situations where a prior will was revoked not by subsequent instrument, but by, e.g., physical act or divorce. Unless also interested by some other means, a beneficiary thereunder would no longer have standing to contest the later will, as even were that challenge successful, the estate would instead generally pass through intestate succession to heirs. *See, e.g.*, *In re* Curtis's Estate, 98 A. 575 (Pa. 1916); *In re* Estate of West, 729 S.W.2d 676, 678 (Tenn. Ct. App. 1987) (appellant must overcome presumption of revocation assigned to lost will before having standing to contest latter one). *See generally* Wade R. Habeeb, *Standing of Legatee or Devisee Under Alleged Prior or Subsequent Will to Oppose Probate or Contest Will*, 39 A.L.R.3d 321 (1971).

[97] Again, the awkward phrasing admittedly conflates rights to sue with timing of their exercise. Technically, no immediate standing to sue arises until the testator dies and the challenge is ripe. Instead, the "right" or "standing" is generated but in abeyance, much as

accepted or even offered into probate, ultimately revoked by later instrument, or perhaps, challenged itself, it usually being sufficient (if questioned at all) that the prior will look regular on its face.[98]

Questions of standing and the legal speech that it implicates do complicate, however, as documentary distance between the contestant and the contested will grows. More specifically, whatever rights a ninth will beneficiary may hold to challenge Will #10, it is far from settled that the same rights are enjoyed by *any* "removed" beneficiary under Wills #1 through 8, much less a disappointed intestate heir without first disposing of the first nine.[99] Nevertheless, and aside from the effects that such party policing may have on efficiency or other jurisprudential concerns, assessing this more distant perimeter further tests the strength of the proposition that no will speaks until its maker's death, and in far more serious ways. For no matter which way the court rules, some will is always communicating at some pre-death point. It is simply stating different things.

a) Putative Heirs v. Removed Later Wills

Faithfulness to the silence maxim demands that standing be available to would-be heirs no matter how many "serially silent" wills with their interloping beneficiaries—even those conceded to reflect prima facie validity—exist between intestacy and the contest claim. For example, an arresting pair of Pennsylvania cases acknowledged such "removed heirs" standing, with each court boldly pronouncing that even "were [there] 10 invalid prior wills of decedent in existence, this, of itself, would not be a compelling reason for this court to foreclose [an heir] contestant's efforts to prove that decedent died intestate."[100]

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property law, through future interests, accepts rights that are vested in interest but deferred in possession, or contingent in quantity but not in quality. *See, e.g.*, *In re* Estate of Koplin, 139 Cal. Rptr. 129, 135 (Ct. App. 1977); *see also infra* notes 76–77 and accompanying text.

[98] As one popular source notes,

> In showing an interest in an estate by reason of a prior will, it is not necessary to develop the facts necessary to entitle the will to probate. However, a person who would not stand to inherit from the testator under intestate succession statutes must demonstrate the prima facie validity of the will under which he or she claims in order to establish the required pecuniary interests to contest the will.

FRANCIS C. AMENDOLA ET AL., 95 C.J.S. WILLS § 525 (2019).

[99] If the facts supported it, this difficulty could be sidestepped merely by altering either the probate processes or the pleadings such that contestants challenged all intervening wills along with the last.

[100] *In re* Heffner's Estate, 43 Pa. D. & C.2d 365, 367 (Pa. Orphans' Ct. 1967); *see In re* Holtz's Estate, 30 Pa. D. & C.2d 396, 400 (Pa. Orphans' Ct. 1963). The *Holtz* Court acknowledged that were other prior wills actually to be offered into probate, the heir would

This perspective is attractive. "[C]ourts exist to determine the truth."[101] Law is disinclined to limit access to the remedies that success in its halls might offer.[102] Particularly where fraud is suggested, prioritizing merits-based outcomes over the proceduralism of standing holds strong intuitive appeal. This perspective pervades a recent decision where the court admitted to feeling troubled by finding itself precedentially compelled to deny the heirs' ability to challenge a removed will: "standing could potentially be used by a wrongdoer to insulate his or her wrongdoing from being challenged."[103] This perspective also inheres in the truism. If wills truly do not speak until death, then they cannot speak upon their mere execution so as to bar an "earlier" heir's entry into court to challenge them. The refusal to accord standing to challenge that hypothetical tenth will because of the prior nine—likely validity of either of those wills or the contestant's challenge to them notwithstanding—would impliedly (and arguably, improvidently) determine that one or all of them

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have to successfully challenge them as well before being entitled to take. *In re Holtz's Estate*, 30 Pa. D. & C.2d at 400. Later Pennsylvania cases moved away from this reasoning, presumably driven by judicial economy and legislative change. For example, in *In re Estate of Briskman*, 808 A.2d 928, 932 (Pa. Super. Ct. 2002), the court stated that were it to permit an heir standing no matter how many wills had been executed, then "an heir at law would always be permitted to file an appeal from probate of a will in which the heir is not a named beneficiary." (True, but not necessarily shocking). The court continued:

> If the Legislature had intended that result, it could have specifically included "heirs at law" among those permitted to appeal the decision of a Register [in the applicable statute]. It did not do so. Moreover, the statute was amended three times . . . since the *Holtz* and *Heffner* decisions. The clear and unambiguous language of the statute permits a party to appeal a Register's decision only if that party has an interest that has been aggrieved. We find that Appellee's contingent interest, either as a successor trustee under the 1984 will, or as an intestate heir at law if both wills are deemed invalid, is too remote to confer upon her an interest in the probate of the 1993 will.

Id. at 932–33 (emphasis omitted); *see also In re* Estate of Swenson, No. 2289 MDA 2013, 2014 WL 10889531, at *3–4 (Pa. Super. Ct. Aug. 1, 2014) (limiting standing to "parties in interest," whose interests are "substantial, direct, and immediate," and who are "aggrieved" by the admission of a will).

[101] Parker v. Benoist, 160 So. 3d 198, 204 (Miss. 2015) (describing the logic upon which good faith exceptions to the enforcement of no contest clauses are based).

[102] For example, courts confronting the enforcement of a no contest clause in a will often discuss "two overarching but diametrically opposed policies: inheritance law's respect for testamentary freedom, and equity's distaste for forfeiture." Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455, 465 (2015) (footnotes omitted). Although these clauses are routinely applied, many jurisdictions either strictly construe them or refuse application against contestants who act with probable cause or in good faith. Florida and Indiana refuse to apply them at all. *See* Lisa Babish Forbes et al., *No-Contest Contests*, 2017, SZ001 ALI-CLE 33, July 13–14, at 1–2, Westlaw.

[103] *In re* Estate of Brock, No. E2016-00637-COA-R3-CV, 2016 WL 6503696, at *6 (Tenn. Ct. App. Nov. 3, 2016), *rev'd*, 536 S.W.3d 409 (Tenn. 2017). The court presumably meant that the wrongdoer would simply take care to execute a series of wills between the first and the final, desired one, so as to create as many barriers as possible to others having standing.

would have been offered for probate, deemed admissible, and thereafter impervious to the slings and arrows of appeal. "Such a determination cannot [collaterally] be made . . . ."[104]

By a slim margin, the determination that wills do not speak so as to bar earlier heirs appears to be the majority rule,[105] perhaps most famously presented by the Michigan Supreme Court in *In re Powers' Estate*. Effectively remonstrating that "intermediate" wills have no effect as anything other than evidentiary, the court permitted heirs—cousins nowhere named in any of the testator's eight wills and who had not seen her in many years—to maintain standing to contest her final will.[106]

The dissent was powerful and swift:

> Such rule, adopted today, aligns [us] with that strange notion—originating in Kansas—that an unprobated earlier will, however valid and probatable that will may have been had death ensued prior to its legal revocation, is a "mere scrap of paper" having no force as evidence of a want of "interest" on the part of would-be contestants of a proffered-for-probate later will. It means, too, for this . . . estate, years of costly contention in [three] separate courts . . . .[107]

In other words, the dissent recognized the potential for the effect of a will immediately upon its execution, and the dissent

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[104] *In re Holtz's Estate*, 30 Pa. D. & C.2d at 400.

[105] At least as of approximately fifty years ago, when "a narrow majority of decisions hold that an heir, though disinherited by a prior will which appears to have been validly executed, retains standing to contest an instrument in which he receives less than his intestate share," *Recent Decisions*, 47 VA. L. REV. 901, 904 (1961), and when the *Holtz* opinion was asserted as being "consistent with the weight of authority in other jurisdictions." *In re Holtz's Estate*, 30 Pa. D. & C.2d at 401. *See, e.g.*, Stephens v. Brady, 73 S.E.2d 182, 184–85 (Ga. 1952); Murphy's Ex'r v. Murphy, 65 S.W. 165, 166 (Ky. 1901). Although modern authorities cavalierly suggest that all heirs hold standing without specifically addressing removed wills, recent case law suggests that this may still be the case, in trend if not actuality. *See, e.g.*, *In re* Jack Wong Yuen & Lei Young Wong Yuen Revocable Living Tr., 312 P.3d 1240, 1240 (Haw. Ct. App. 2013); *In re* Estate of Schlenker, 789 N.E.2d 456, 458–89 (Ill. App. Ct. 2003), *aff'd*, 808 N.E.2d. 995 (Ill. 2004); *In re Estate of Brock*, 2016 WL 6503696, at *5–6 (urging reconsideration of state precedent, including the "venerable and influential case" of *Cowan v. Walker*, 96 S.W. 967 (Tenn. 1906), which had prevented an heir from challenging a removed will unless the prior ones were invalid on their face). This is not to say that the decisions are now in accord. Courts continue to "struggle with the effect earlier wills may have on an heir's share of the estate and his or her standing to contest a will." ROSS & REED, *supra* note 29, § 3:4. And notwithstanding the bold rhetoric of early cases like *Holtz*, Pennsylvania courts now seem to be holding strong in the opposite direction. *See, e.g.*, *In re* Estate of Briskman, 808 A.2d 928, 931–32 (Pa. Super. Ct. 2002); *In re* Estate of Burger, 852 A.2d 38, 390 (Pa. Super. Ct. 2004), *aff'd*, 898 A.2d 547 (Pa. 2006).

[106] *In re* Powers' Estate, 106 N.W.2d 833, 836 (Mich. 1961). The holding in *Powers* might owe more to egregious facts than theoretical care: the testator had written numerous wills in a short period of time, with her last leaving close to three-fourths of a million dollars to the drafting attorney's spouse and executed just shortly before she was committed to a mental institution. *Id.* at 834.

[107] *Id.* at 839.

has many champions.[108] To it and like-minded thinkers, heirs should be afforded no right to challenge a removed will where they are similarly disinherited from intermediate ones, a posture which, as the excerpt suggests, is heavily defended by efficiency. Perhaps unintentionally, courts thus set the asserted fragility of the intestate expectancy against the strong arms of the testate one, suggesting that while neither constitute property, the one created by will speaks more loudly than the one created by law through an intestate succession scheme.

That competing jurisdictional perspectives have emerged—heirs will either hold or lack standing to contest a removed will—misleads if it suggests that wills only speak early under one of them. This is not so. Tracking the theoretical split across jurisdictions, both the majority and the dissent in *Powers* either intimate or explicate that they do. By withdrawing heirs' standing against a removed will, the slight minority view reflected in the dissent implicitly bestows legal effect to all intervening wills just as soon as they are executed and whether or not they are later themselves revoked. They thus speak in the negative: by removing challenge rights from those "putative heirs." And although the majority's reaffirmation of an heir's continued standing against not just the first/next but *any* removed will might silence the intervening ones regarding standing proper, the cases often explicitly admit their evidentiary voice.[109]

Recall that which the Michigan Supreme Court indirectly urged in *Powers*: intermediate wills that precede the final will have no effect as anything *other than evidentiary*. As earlier addressed, this assertion acknowledges at least *some* effect, which means that pre-death wills mean more than nothing. But logically extended, it also reveals its own paradoxical core. Suppose a testator has executed two valid wills, the second revoking the first. Were the *Powers* Court's intimation consistent and conclusive, the existence of Will #1 would not only limit intestate heirs' rights to challenge Will #2, it would also afford no rights to its *own* beneficiaries to challenge Will #2. That this is so in

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[108] *See, e.g.*, Mitchell v. Redvers, No. MMXCV094010266S, 2009 WL 5511262, at *2 (Conn. Super. Ct. Dec. 17, 2009); Conner v. Brown, 3 A.2d 64, 74 (Del. Super. Ct. 1938); Newman v. Newman, 766 So. 2d 1091, 1094 (Fla. Dist. Ct. App. 2000); Livingston v. Livingston, 153 N.W. 200, 203 (Iowa 1915); *In re* Succession of Feitel, 175 So. 72, 80 (La. 1937), *overruled by In re* Succession of Jenkins, 481 So. 2d 607 (La. 1986); Batt v. Vittum, 30 N.E.2d 394, 395 (Mass. 1940); *In re* Estate of Briskman, 808 A.2d 928, 931 (Pa. Super. Ct. 2002); Dauray v. Mee, 109 A.3d 832, 841 (R.I. 2015); Cowan v. Walker, 96 S.W. 967, 971 (Tenn. 1906); Belford v. Casto, No. 14-1218, 2015 WL 6143388, at *5 (W. Va. Oct. 16, 2015).

[109] *See supra* notes 106–108 and accompanying text.

precisely zero jurisdictions, including Michigan itself, is telling.[110] Executed wills are always speaking legally about standing. The difference just lies in what they say.

b) Beneficiaries v. Removed Later Wills

Asking when a will speaks presses yet harder against the traditional "not until death" answer when the contestant is a beneficiary under, say, an earlier fourth or seventh will, rather than a disinherited heir. Preliminarily, unless law were to admit that through intestacy, it knew better (if not best) who "should" take from a decedent's estate,[111] it would seem peculiar for a jurisdiction to permit an erstwhile heir—whose status derives from old, blood-based default rules—to challenge a removed will, yet withhold equal rights from some beneficiary whom the testator had actually named.[112] The rights of such chosen takers under Wills #1 through 9 may be conceptually closer in intent, time, paper, and heart to the testator and that tenth will than any legislatively selected (but perhaps consistently disinherited)

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[110] And *Powers* itself proves it. Part of the case concerned charitable beneficiaries under the testator's prior will who also challenged her final estate plan along with the intestate heirs. By focusing on the propriety of a guardian ad litem or prosecuting attorney to represent the charities' interests, the court essentially assumed that the intermediate, "no effect" will indeed afforded them standing. *In re Powers' Estate*, 106 N.W.2d at 839. An early treatment of *Powers* sharply suggests this paradox:

> [I]t is submitted that a degree of conceptual difficulty is encountered in an attempt to justify a rule which demands the exclusion of a prior will when offered by a *proponent* [of a later will wishing to deny standing to an heir] while allowing its admission if such instrument is sponsored by a *contestant* [of that later will who is a beneficiary under the prior will].

Recent Decisions, *supra* note 105, at 904 (emphasis added).

[111] This admission would not be made lightly. Although early on, "only God could make an heir," and while "[t]here are certainly arguments in favor of the principle that the owner should not be allowed to disturb the course of inheritance [that] the law has provided," ATKINSON, *supra* note 8, at 34, courts stress the default nature of intestacy, including by noting when decedents could or should have "opted out" of it and permitting donative instruments to define intestate terms s in ways that might differ from statute. *See generally* EDMOND N. CAHN, SOCIAL MEANING OF LEGAL CONCEPTS - NO. 1, INHERITANCE OF PROPERTY AND THE POWER OF TESTAMENTARY DISPOSITION (1948) (assessing testamentary freedom from economic, sociological, ethical, and anthropological perspectives).

[112] Statutes of descent and distribution are effectively just a series of relational contingencies, the greatest of which could be the failure to execute a will. *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1062–69 (2004). Similarly, it could also be read as a legislative "class gift" to heirs, descendants, or other contingent categories. Who fits within a class under a donative instrument is a matter of personal privilege, such that as applied to a class gift for descendants, even old doctrines like the Stranger to the Adoption rule would yield to expressive clarity. In one sense, then, the entire will can be viewed as the testator's "definition" of "successors in interest." To name something is to know it, and in a will, to choose it.

heir ever could.[113] In a roundabout way, what the *Powers*' dissent characterized as "that strange [Kansas] notion"[114] drawn from a second prominent case of *Marr v. Barnes*—that wills have no early effect—instructs:

> A will neither confers rights on its named beneficiaries nor deprives heirs of their rights until it has passed the scrutiny of the probate court; and its presentation for probate and some action favorable or unfavorable thereon by that tribunal are prerequisites to a contest over its validity in a court of general jurisdiction.
>
> . . . .
>
> . . . How an *unprobated* will could be said to be a *valid* will and used in litigation as a *valid* will to the prejudice of an heir who has never had a chance to question its validity calls for a subtlety of reasoning which we would not care to follow.[115]

By supporting broad retention of heirship standing, observations such as this one affirm the silence of wills. But if standing is largely prudential and legislative, heirs' rights could be claimed without overbroad justification. Moreover, read with what may be its own inappropriate subtlety, the referenced quote is fairly astounding. First, by stating that the will neither confers nor withdraws rights, the quote illogically suggests that takers under hypothetical Will #1 may not challenge hypothetical Will #2, which as earlier noted, is nowhere the case. The quote extends a second slightly broader (and stickier) invitation that also confounds with its words. If, as the court states, an unprobated will cannot be used in litigation to the prejudice of an *heir* who has had no chance to question its validity, perhaps the same should be said of its inability to prejudice any prior *will beneficiary* lacking similar chance. If so, perhaps *all* validly executed wills—even revoked and unprobated ones—should speak immediately upon execution by granting inchoate "contest standing" to those there named, which would make the second half of the quote internally inconsistent with the first. It almost seems as though commentators of a mind with the *Marr* and *Powers* courts might be confused, in claiming that wills cannot speak "early" so as to cut off rights yet letting them speak early to create them.[116]

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[113] Much here would depend on one's view of the role of intestacy vis-à-vis the will, e.g., as a backstop or safety net, or perhaps background or default. That view might inform perception.

[114] *In re Powers' Estate*, 106 N.W.2d at 839 (Black, J., dissenting).

[115] Marr v. Barnes, 267 P. 9, 10 (Kan. 1928).

[116] Notwithstanding the fulmination engaged by the *Powers* and *Marr* courts over wills not being or meaning much of anything until probated, both jurisdictions join every other state in permitting beneficiaries of an earlier will to challenge at least the next one.

Beneficiaries under one will challenging the efficacy of the just-next is one thing. But inchoate standing becomes even trickier and the opportunity for "early speech" that much more intense when the claim is brought by earlier beneficiaries against a more distant will where there are testamentary documents interposed between them. As to the takers under Will #1: they will either have a right to contest Will #10, or they won't. As to the silence of wills, however, the substantive superiority of either result is irrelevant. Whichever jurisdictional path is taken, some testamentary document will have thereby spoken legally upon execution, thus before death, but simply saying different things.

In jurisdictions where beneficiary standing survives against immediate and removed later wills alike, each *earlier* will says "yes" to its present beneficiaries by immediately affording them inchoate challenge rights against potential future beneficiaries of all potential future wills. In jurisdictions where beneficiary standing does not survive against removed later wills, each *later* will says two things: "no" to existing, prior will beneficiaries by extinguishing their "old challenge rights," and "yes" by simultaneously conferring "new challenge rights" on its own beneficiaries against the erstwhile "just next" will. Admittedly, courts actually engaging in the policy of the inquiry with the benefit of actual, hindsight facts would favor a less doctrinaire assessment in favor of discerning what it would take for a given contestant to secure a share of the estate in light of governing standing rules.[117] The steeper the climb, the less realistic that possibility; the lessened the possibility, the less likely the holding that standing exists.

No matter that particularized result, however, in ruling on the issue, the court will unavoidably be giving effect one way or another to some prior, perhaps not probated, possibly never valid, arguably amended, and maybe even already revoked will,

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See, e.g., *In re* Estate of Milward, 73 P.3d 155, 157–58 (Kan. Ct. App. 2003) (permitting executor under "prior will," as person interested in estate, to challenge codicil altering executor selection); *In re* Parker's Estate, 255 N.W. 318, 320 (Mich. 1934) (holding notwithstanding inability to establish its due execution, beneficiaries of earlier, revoked will sufficiently interested to contest later one); *Persons Who May Contest Will*, 13 MICH. PL. & PR. § 100:29 (2d ed. 2019), Westlaw ("A beneficiary under a prior will . . . has the requisite interest to contest a will . . . ." (footnote omitted)).

[117] Were the applicable statute to permit "any heir" to contest a will irrespective of the number of wills between that heir and the one being challenged, parity of reasoning would seem to afford the same rights to an early beneficiary. But if the jurisdiction statutorily or judicially places more focus on, e.g., "parties in interest," whose interests are "substantial, direct, and immediate," and who are "aggrieved" by the admission of a will into probate, the degree of contingency becomes more critical and standing more fluid and case-sensitive, and perhaps more susceptible to denial. *See In re* Estate of Luongo, 823 A.2d 942, 953 (Pa. Super. Ct. 2003); *see also supra* note 90 and accompanying text.

and doing so based on its mere execution to either give or strip legal rights. Were it otherwise, no heir would ever have standing to contest anything but the very first and only, unchanged will. This is a result that half of the jurisdictions reject. What is more, no taker under any prior will "no longer in effect" when the decedent died would *ever* have standing to challenge a later one—a result that no jurisdiction accepts.[118] The issue might be even more intense. Rights to contest might pass as a chose in action through the estate of a would-be contestant who has died, with suit sometimes permitted by the personal representative or testate/intestate successor.[119] Boldly claimed, if a right to challenge a will is a chose in action, and if the chose in action equals property, then the very right to contest equals property, arising merely by making a will.[120]

Straight will contests might not even capture the potential breadth of the "wills speaking early" effect. Analogous inquiries could include whether and when beneficiaries under a will may resist an application to admit a will to probate,[121] are interested or necessary parties to, should be joined in, or deserve notice of, another's will contest,[122] challenge probate jurisdiction, or have a

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[118] Unless perhaps the later will were deemed to supplement instead of replacing the former one, and the change did not negatively affect the earlier takers.

[119] This appears to be so whether the contest is first commenced before or after the contestant's death. *See, e.g.*, Sheldone v. Marino, 501 N.E.2d 504, 505–06 (Mass. 1986); Hernon v. Hernon, 908 N.E.2d 777, 780–81 (Mass. App. Ct. 2009); *see also In re* Field's Estate, 238 P.2d 578, 580 (Cal. 1952) ("No such distinction may be made [between a will contest that has versus has not been filed]. So long as the right survives as a right of property, the result may not be made to depend on whether the contest was commenced before the owner of the right died."). Strikingly, these and other cases characterize the contest as a non-personal asset "in the nature of a property right." *See, e.g.*, Kinsella v. Landa, 600 S.W.2d 104, 107 (Mo. Ct. App. 1980) ("[T]he right to contest a will . . . . has become a substantial property right that survives its owner and is exercisable by his personal representative or heirs."). *See generally* Wanda Ellen Wakefield, *Modern Status: Inheritability or Descendability of Right to Contest Will*, 11 AM. L. REP. 4th 907, 910 (1982).

[120] Granted, these authorities seem to be discussing contest rights that have already accrued, i.e., at the death of the relevant testator. It is less clear whether similar arguments could be made on behalf of heirs or beneficiaries to the estate of a potential contestant who would have had standing had she survived the decedent. The issue would implicate whether the right to contest a will is vested and if so, when, along with questions of survival, representation, and lapse.

[121] The answer to which "is substantially the same as the question of the parties who may contest the will." 3 BOWE & PARKER, *supra* note 94, § 26.36.

[122] The effect could be profound. For example, the failure to properly notify all interested parties of a will contest may mean that the court has no jurisdiction to proceed, thus justifying dismissal (even where improper notice is first raised on appeal). ATKINSON, *supra* note 8, at 516 (citations omitted). Relatedly, those who were entitled but do not receive notice might have a "valid basis for collaterally attacking the order closing the probate proceeding." M. Read Moore, *Fairness and Finality: Notice to Beneficiaries Under Prior Wills*, 29 REAL PROP. PROB. & TR. J. 817, 847 (1995). If a court determines that putative heirs or prior beneficiaries are not interested, or that their involvement in the proceedings is not necessary, again the later wills spoke when the disappointed individuals "lost their 'expectancy' of an inheritance in an action which determined the validity of both wills without

right to appeal an adverse determination.[123] Although perhaps more likely in jurisdictions acknowledging ante-mortem probate,[124] even more ranging questions and effects could capture the rights of will beneficiaries to challenge the revocation of a will,[125] sue a third party for tortious interference with an expectancy,[126] dispute a guardian's decision regarding a protected party's property or person,[127] seek compensation for a taking of the testator's property or estate,[128] or seek a particular construction of a later will[129]—all of which, to the extent that putative beneficiary status is deemed at all relevant, is a lot of eventual legal effect for a document purportedly having nothing, yet, to say.

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ever taking part in the action and having their day in court." Kent A. Jeffirs, *Always the Last to Know: No Notice Is Good Notice to Disinherited Family Members Who May Challenge the Validity of A Will*, RES GESTAE, Oct. 1996, at 27, 29 (urging expanded notice obligations notwithstanding the costs). *But see* H. Neal Wells III, *Responding to the Call for Fairness and Finality: Would Notice to Beneficiaries Under Prior Wills Produce Either?*, 29 REAL PROP. PROB. & TR. J. 849, 867 (1995) (counseling limited notice requirements).

[123] *In re* Estate of Brock, 536 S.W.3d 409, 416–18 (Tenn. 2017).

[124] *See infra* note 82 and accompanying text.

[125] The question posed is not unique if the earlier will had been revoked by subsequent instrument, given that challenging the revocation of the earlier will would be accomplished commensurately with challenging the execution of the later one. But if the earlier will is revoked by physical act (such as interlineation or obliteration), and unless that act itself somehow qualifies as a subsequent instrument, there is no document to challenge; only conduct.

[126] In part because of its seeming interference with conventional and intertwining of estates doctrine, including testamentary freedom, the non-right/non-property status of the expectancy, and the ambulatory nature of the will, the tort remains controversial and undertheorized. Significant insight can be gained from John C.P. Goldberg and Robert H. Sitkoff, who argue that "[d]espite its growing acceptance, the tort is deeply flawed[,] . . . its recognition was a doctrinal wrong turn that should be repudiated." John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 396. Their work reiterates many of the principles that shadow the present discussion:

> The interest of a prospective beneficiary under a will or will substitute does not ripen into a cognizable legal right until the donor's death. Until then, a prospective beneficiary has a mere "expectancy" that is subject to defeasance at the donor's whim.
>
> A similar analysis applies to the interest of a prospective intestate heir, called an "heir apparent." The interest of an heir apparent is not a right but an expectancy that is contingent on the heir apparent surviving the donor and the donor not otherwise disposing of his property. Like a prospective beneficiary, an heir apparent has no legally cognizable interest, not even a reliance interest, in an expected inheritance prior to the donor's death.

Id. at 342–43 (footnotes omitted). Heavily swayed by their work and the deep tensions it reveals, the Supreme Court of Texas, in a split decision, recently held that there is no cause of action for interference with an expectancy, overruling six appellate cases to do so. Archer v. Anderson, 556 S.W.3d 228–29 (Tex. 2018).

[127] *See supra* notes 82–87 and accompanying text.

[128] *See supra* note 73 and accompanying text.

[129] *See, e.g.*, Bernstein v. Lopata, 819 N.Y.S.2d 208 (Surr. Ct. 2006), *aff'd sub nom. In re* Bernstein, 40 A.D.3d 1086 (N.Y. App. Div. 2007).

2. Revocation and Revival: Looking Back from Execution

The extent to which executing a will offers inchoate standing to those it names highlights a "positive" change to the status quo by adding some value, although operationally deferred, where none had existed before. The reverse is also true. An executed will can also *remove* prior rights, again at execution rather than death. The claim that wills mean nothing upon execution and everything upon death is therefore further contradicted by the revocatory effect of later wills on those earlier made.

a) Basic Revocation Doctrine

Assume that Testator ("T") has validly executed Will #1, naming A, B and C as beneficiaries. So long as T remains alive and capacitated, that will can later be revoked in every state by physical act,[130] subsequent instrument,[131] or operation of law.[132]

The essentials of these revocation methods are straightforward. If at some point after executing the will, T develops revocatory intent and undertakes a compliant means through which physically to effect it, then Will #1 no longer legally exists and T no longer holds testator status. Were she to then die without executing a new will, she would die intestate.[133] Her property would pass through descent and distribution to statutorily identified heirs, who could end up being A, B, and C, but perhaps not; T's prior subjective intent

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[130] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 4.1 (AM. LAW INST. 1999); UNIF. PROBATE CODE § 2-507 (amended 2010). With slight jurisdictional variation, one may burn, tear, cancel, obliterate, or destroy the will. Note that the evidentiary and theoretical concerns that attempts to partially revoke (as through interlineation) may generate lead some jurisdictions to reject partial revocation by act. *See, e.g.*, FLA. STAT. ANN. §§ 732.502, 732. 505 to .506; GA. CODE ANN. §§ 53-4-41; 53-4-44; Cioeta v. Estate of Linet, 850 So. 2d 562, 564–65 (Fla. Dist. Ct. App. 2003); Peterson v. Harrell, 690 S.E.2d 151, 152–53 (Ga. 2010). Every jurisdiction, however, accepts total revocation through physical act. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 4.1, cmt. e (AM. LAW INST. 1999).

[131] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 4.1 cmt. b (AM. LAW INST. 1999). Revocation by later instrument, which is generally simply revocation by later will, may be express or implied, and in whole or in part.

[132] *Id.* § 4.1 cmts. o, p, & q (1999).

[133] This would presumably be so even if T had, e.g., ripped up the document but then taped it back together, similarly to how real property, once transferred, cannot be reconveyed back to the grantor simply by ripping up a deed. *See, e.g.*, Metcalf v. Altenritter, 369 N.E.2d 498, 501 (Ill. App. Ct. 1977) (post-delivery attempt to revoke conveyance through destruction of deed ineffective). *But see* RESTATEMENT (THIRD) PROP.: WILLS & DONATIVE TRANSFERS § 4.2 cmt. I, illus. 7 (AM. LAW INST. 1999) (suggesting that such re-taping, particularly if coupled with written indication of intent, could meet the clear and convincing evidentiary standard necessary to revive the torn will).

manifest through the will no longer controls anything. The objective terms of the statute take its place.

Instead of destroying Will #1, suppose T writes Will #2, which revokes Will #1 expressly[134] or by total implication.[135] Again, the outcome is logical, intuitive, and legally clear. Will #2 will replace Will #1. At least as a dispositive instrument, Will #1 no longer holds overt relevance, with Will #2 set to control the testate distribution of T's estate should it remain at T's death. Instead of the statute replacing Will #1, it is later Will #2 (which may even end up being the "last" Will and Testament) that does.

At least insofar as property disposition is concerned, the outcome of validly revoking the first will through either act or document steadfastly tracks the traditional rule silencing wills until their testators die with them intact. Formerly valid Will #1 is no longer legally intact given the hypothesized confluence of intent and action that revoked it. Not being intact at the testator's death, it therefore has no ongoing legal voice, other than an evidentiary[136] or standing-determinative one.[137] It has ceded control to its later replacement—intestacy or later Will #2. But where revocation does occur through subsequent instrument, further testamentary conduct—a distinct possibility once the mental block to will-making has been broken[138]—the propriety of the "silent will" wisdom is strained.

b) Basic Revival Doctrine

Assume that T writes Will #1, changes her mind and writes Will #2, then later decides that she again prefers the distributive scheme reflected in Will #1. A careful testator would simply execute identical Will #3 directly (which is a much easier act in 2020 than it may have been out on the prairie).[139] Nevertheless, believing that the only thing that inhibits the effect of Will #1 is the one that revoked it, T physically revokes Will #2.

Particularly by one having fully (but perhaps unwittingly) internalized the inefficacy of wills before death, this apprehension

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[134] Express revocation is commonplace in a well drafted will, effected as simply as by stating "I revoke all wills and codicils previously made by me." HARRIS 6TH N.Y. ESTATES: ESTATE PLANNING & TAXATION § 2:1 (2016).

[135] Revocation by implication occurs where instead of specific revocatory expression, the later will is partially or wholly inconsistent with the prior one, as where it distributes the entire estate through a residuary clause. *See, e.g.*, PROBATE, ESTATES, AND TRUSTS, 9 SUMM. PA. JUR. 2D § 1:114 (2d ed. 2020).

[136] For example, as a foil against which to assess the suspiciousness of circumstances attending a profound scheme change in Will #2. *See supra* Section II.A.

[137] *See supra* Section III.A.1.

[138] If fear deters will-making, first confronting the fear might remove the deterrence.

[139] On geographical and practical fronts.

of the two-will interplay is logically and legally defensible. In Solitaire, a covered card is back in play should those placed atop it be used. Here, the similar theory would be that Will #1 was never completely dead. Instead, it was but temporarily neutralized by the paralyzing effect of a subsequent-but-as-yet-ineffective instrument (Will #2), the disposal of which during T's life would mean that it had never actually spoken, permitting Will #1 to revive and breathe again. The revocation of the revocation would revoke the revocation, much like the "enemy of my enemy is my friend."[140]

This perspective finds early traction at English common law. Indeed, from at least 1770 on, it was the lone position taken in England for freeholds, until the English Wills Act of 1837 replaced it and its intent-based ecclesiastical contemporary[141] with a statutory hard line over whether and when the prior will would return to good grace.[142] Confronting the effect of revoking a later will on the former in the prominent case of *Goodright v. Glazier*, Lord Mansfield thought the matter "so plain as to render [extended argument] unnecessary," and invoked orthodox principles in defense:

> A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will: if he does not suffer it to do so, it is not his will. Here, he had two. He has cancelled the second: it had no effect, no operation; it is as no will at all, being cancelled before his

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[140] This proverb has been traced to an old Sanskrit saying. *See The Enemy of My Enemy Is My Friend*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_enemy_of_my_enemy_is_my_ friend [https://perma.cc/9WHM-U22M].

[141] By the medieval period, English law maintained a fairly clear (although not without its own difficulties) jurisdictional divide between matters of Church and State. Ecclesiastical courts handled succession to personal property and chattels (and recognized an intent component to revival); common law courts handled land (and its automatic revival as described above). "That division . . . could never be maintained strictly in probate practice, and it complicated the administration of many estates. It is hard to defend." HELMHOLZ, *supra* note 84, at 388. To Maitland, the consequences of the division "have been evil. We rue them at the present day, and shall rue them as long as there is talk of real and personal property." *Id.* (quoting POLLOCK AND MAITLAND, *supra* note 19, at 381); *see also* HELEMOLZ, *supra* note 84, at 397–98 (counting as one of the "five 'facts of probate life'" that all participants recognized the division between lands and chattels). It is unsurprising that the ecclesiastical rule turned so heavily on intent, given that it allowed oral declarations to both establish, and to revoke, a will. "What would matter to the English ecclesiastical courts was what the testator had truly intended, not necessarily what his testament contained." HELMHOLZ, *supra* note 84, at 54. Moreover, an oral will could even revoke a written will under ecclesiastical law. "For the purpose of disposing of chattels, English ecclesiastical law treated oral wills as fully equivalent to written testaments in virtually every respect. The most dramatic . . . [being] the rule that an oral will might revoke a written will." *Id.* at 400.

[142] Wills Act 1837, 7 Will. 4 & Vict., c. 26, § 22 (Eng.) ("No will . . . which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intent to revive the same . . . .").

> death. But the former, which was never cancelled, stands as his will.[143]

Although there eventually arose "great divergence of viewpoints among the American cases,"[144] this version of automatic revival was well recognized in such early decisions as *Lawson v. Morrison*,[145] with the court then observing how "[i]t has been often determined, that a Will, revoked by a subsequent Will, but not cancelled, was re-established by the cancellation of the subsequent Will."[146] In the more prominent case of *Whitehill v. Halbing*,[147] which extensively discussed *Goodright* and similar outcomes, the court ultimately determined that "the principle declared and applied in each case is that, to effect a revocation by a later will, that will must subsist at the death of the testator."[148] Like English common law, the *Halbing* Court's view fully aligns with the perspective that wills do not speak until death. Nevertheless, at some point that position clearly and resoundingly changed, rendering Lord Mansfield's Rule not only dated, but naïve if not wrongheaded, and ultimately near obsolete.

Consider the early perspective of later Harvard Law School Dean Roscoe Pound in urging that an intent-based answer to the revival question was "greatly to be preferred":

> We cannot think . . . that the Legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require.[149]

Dean Pound continued:

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[143] Goodright v. Glazier (1770) 98 Eng. Rep. 317, 319. Justice Yates concurred along remarkably similar lines:

> A will has no operation, till the death of the testator. This second will never operate: it was only intentional. The testator changed his intention, and canceled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable: and he has revoked it.

Id.

[144] ATKINSON, *supra* note 8, at 475.

[145] Lawson v. Morrison, 2 U.S. 286, 289 (Pa. High Ct. Err. & App. 1792).

[146] *Id.* at 289.

[147] Whitehill v. Halbing, 118 A. 454 (Conn. 1922).

[148] *Id.* at 455–56; *see also* Samuel A. Persky, *Effect Upon a Prior and Existing Will of the Revocation of a Subsequent Will Containing an Express Revocatory Clause*, 32 YALE L.J. 70, 71 (1922). It appears that Mr. Persky represented the victor in the underlying case. *Id.*

[149] Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903).

> A few jurisdictions adhere to the rule as stated by Lord Mansfield. But the strong tendency in the United States is to follow the rule of the English ecclesiastical courts, and hold that if the testator destroys a subsequent will, revoking a former one either expressly or by implication, such act, of itself, will not revive the former will. Following the English act of 1837, the statutes, wherever this subject has been dealt with by legislation, are all against the doctrine of constructive revival of the prior will. Hence we may well regard Lord Mansfield's rule as disapproved, and the doctrine of the ecclesiastical courts as vindicated.[150]

Perhaps in part through the power of Dean Pound's early assertion, there is no longer "great divergence" on the issue, at least as legislatively revealed. Three perspectives exist:

Auto-Revival	Revival Upon Intent	Anti-Revival
Where Will #2 revokes Will #1, and is later itself revoked by physical act, Will #1 regains legal vitality, i.e., is "revived," and the decedent's estate passes under Will #1.	Where Will #2 revokes Will #1, and is later itself revoked by physical act, Will #1 regains legal vitality, i.e., is "revived," if there is sufficient evidence that T so intended. Depending on evidentiary outcomes, the estate will thus pass through Will #1 or intestate succession.	Where Will #2 revokes Will #1, and is later itself revoked by physical act, Will #1 does not regain legal vitality, i.e., is not "revived," and the decedent's estate passes through intestate succession unless Will #1 is later reexecuted or incorporated in some manner.[151]

[150] *Id.* at 708–09 (internal citations omitted). In addition to the narrow rule of revival, Dean Pound's view could be said to speak to the broader question at issue: even in a legal space in which he prized stability, old stated "rules" might not always be true, and perhaps should not control new realities. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 1, 171–72 (Marshall Jones Co. 1921).

[151] The Doctrine of Dependent Revocation offers a third possible outcome in an anti-revival jurisdiction. If there is sufficient evidence that T (1) revoked Will #2 on the mistaken belief that Will #1 would be revived, and (2) would likely prefer the now-revoked Will #2 to intestate succession, its revocation might be undone on the theory that it was conditioned on T's desired (but unavailable) outcome. *See, e.g.*, *In re* Estate of Alburn, 118 N.W.2d 919, 920–21 (Wis. 1963); *see also* ATKINSON, *supra* note 8, at 452–63. *See generally* JEFFREY A. SCHOENBLUM, 2 PAGE ON WILLS §§ 21.57 to .65 (William J. Bowe & Douglas H. Parker eds., rev. ed. 1960 & Supp. 1996).

In every modern American jurisdiction,[152] *both* wills are generally deemed revoked—Will #1 by Will #2, Will #2 by physical act—and barring evidentiary rescue, T will join the roughly two-thirds of Americans who die intestate each year.[153]

(1) Revival Theory and Speech

These outcomes reveal the terse tension between what "no will speaks" states and what the law of revival does. To the theoretical purist, if no will has a legally operative voice until the death of its maker, then the automatic revival reflected by Option 1 would be the only plausible outcome and would capture 100 percent of the jurisdictional result. Moreover, to call that result "automatic revival" would semantically err, for if Will #2 is deemed to have never yet spoken, Will #1 was never actually revoked so as to be in need of begging revival, automatic or otherwise.[154]

But that is not what has happened. The purist's automatic revival has been statutorily rejected in every American jurisdiction. If it survives at all, it can only be in a very few of the already few jurisdictions with no statute on point,[155] notwithstanding that a twilight version occasionally appears.[156] Instead, Option 2 (Revival Upon Intent) and Option 3 (Anti-Revival) have emerged, together accounting for 100 percent of the jurisdictions where the issue is

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[152] With slight exception that appears to exist only in Georgia. *See infra* note 156.

[153] *See supra* notes 30–34 and accompanying text (describing estate planning statistics and reasons for same).

[154] A recent case explores crucial theoretical differences between revival and dependent relative revocation, which are often confused. *In re* Estate of Melton, 272 P.3d 668, 679 (Nev. 2012).

[155] Revival was early recognized as finding expression within a "line of cases," A.C.B., *Wills-Revocation by the Execution of A Subsequent Will*, 3 TEX. L. REV. 499, 500 (1925), including *Whitehill v. Halbing*, 118 A. 454, 458 (Conn. 1922) and *Bates v. Hacking*, 68 A. 622, 630 (R.I. 1907), neither of which has been overruled.

[156] For example, Georgia law differentiates express and implied revocation by operationalizing the latter only when the subsequent will takes effect upon death. "If the subsequent inconsistent will fails to become effective from any cause, the implied revocation is not completed." GA. CODE ANN. § 53-4-42.

statutorily addressed, and capturing approximately 46 percent[157] and 34 percent buy-in, respectively.[158]

Whatever one might feel about the advisability or allure of either Option 2 (Revival Upon Intent) or Option 3 (Anti-Revival), and on intent or efficiency grounds, both options corrupt the maxim that wills have no pre-death effect. As with questions of standing and oversight, each view gives voice to the pre-death will, but simply in differing ways.

(2) Anti-Revival Is Pro-Speech

As earlier addressed, the English Wills Act of 1837 settled the conflict between the common law (automatic) and ecclesiastical (intent-based) revival rules by replacing both with a statute limiting a will's revival to instances of its actual reexecution[159] or republication.[160] Loosely termed "anti-revival," this view of the interplay between later wills and their priors acknowledges—overtly—the early speech of wills. The Virginia statute is typical: "[No will, codicil, or part thereof] shall . . . be revived unless such will or codicil is reexecuted in the manner required by law."[161] This approach irretrievably revokes the

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[157] *See, e.g.*, data collected in *50 State Statutory Surveys: Trusts and Estates: Descent and Distribution Amendment and Revocation of Wills*, 0160 Surveys 2, THOMSON REUTERS (2018); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 4.2 (AM. LAW INST. 1999). Variations on intent-preferencing statutes are common. *See, e.g.*, ATKINSON, *supra* note 8, at 474–75; RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 4.2, Reporter's Note d (AM. LAW INST. 1999). One example involves presumed intent. Although original 2-509 of the UPC always presumed against intent to revive, its current version presumes for revival where Will #2 had only partially revoked Will #1. Non-UPC jurisdictions sometimes turn on whether the later will revoked the earlier expressly or by inconsistency, or whether its controlling statute permits documentary revocation only through a "later will or codicil" or adds a third "writing" that meets the formalities of a valid will. Jurisdictions purportedly agnostic over revival presumptions effectively place the burden on those seeking it, and are fairly liberal over what type of evidence to accept.

[158] That approach, which remains in England, is clearly statutorily expressed in ARK. CODE ANN. § 28-25-110, D.C. CODE § 18-109(b); FLA. STAT. § 732.508 to .511; 110 ILL. COMP. STAT. 755/ 5/4-7; IOWA Code § 633.284; KY. REV. STAT. § 394.100; MD. EST. & TRUSTS CODE § 4-106; N.J. REV. STAT. § 3B:3-15; N.Y. EST. POWERS & TRUSTS LAW § 3-4.5; N.C. GEN. STAT. § 31-5.8; OR. REV. STAT. § 112.295; 20 PA. CONS. STAT. § 2506; VA. CODE ANN. § 64.2-411, and W. VA. CODE § 41-1-8.

[159] As where the earlier document is literally re-subjected to the original execution formalities, e.g., it is signed again by the testator and witnesses. *See* ATKINSON, *supra* note 8, § 89.

[160] As where the earlier document is "re-upped" (with an accompanying implicit review and approval) through the execution of a codicil thereto. *See, e.g.*, FLA. STAT. ANN. § 732.5105; Dyess v. Brewton, 669 S.E.2d 145, 146 (Ga. 2008). Codicils therefore operate similarly to a specialized form of incorporation by reference, under which the document to be incorporated itself meets the meets the requisite testamentary formalities.

[161] VA. CODE ANN. § 64.2-411.

earlier will immediately upon the (by necessity, pre-death) execution, rather than probate, of the later.

Jurisdictions may arguably temper that strictness through statutes that, in addition to permitting revival by reexecution or republication of the first will, allow it by revocation of the second if it appears *by the terms* of such revocation that the testator intended to revive the first.[162] An alleged ambiguity turns on the word "terms." Under the seemingly obvious statutory interpretation, revival apparent "by the terms of such revocation" means that Will #2 must be revoked by a written and otherwise statutorily compliant third document, itself bearing the requisite "terms" reflecting an intent to revive. If so, such statutes do not differ materially (if at all) from more strictly worded ones, and what the statute deceptively calls revival is actually a form of incorporation by reference. Under a second interpretation, "terms revealing intent to revive" could be expressed orally, such as where T rips up Will #2 accompanied by a chance but provable aside: "I am simply so relieved to hereby revoke the only impediment that exists to the viability of the will that I had executed heretofore, which I now, through this act, am reviving!" Such a forgiving statutory construction would move this subset of Anti-Revival statutes toward the middle, intent-based approach. But it would be most peculiar, and unlikely to often arise.[163]

By demanding compliance anew with execution formalities before the originally executed document can be reestablished, jurisdictions falling into Option Three (Anti-Revival) reject the fundamental premise of both revival and the deferred speech of wills itself. To restate the proposition in reverse: if a later will—itself inchoate until its creator dies—can inalterably revoke an earlier will at the very instant of its execution, then it has spoken, profoundly, in law.

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[162] For example, the relevant Oklahoma statute provides that "the destruction, canceling or revocation of [a later will] does not revive the former, unless it appears by the terms of such revocation that it was [Testator's] intention to renew the former will, or unless after such destruction, canceling or revocation, he republishes the prior will." OKLA. STAT. ANN. tit. 84, § 106; a similar provision in Indiana states that "if . . . the testator shall execute a second [will], a revocation of the second [will] shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it . . . ." IND. CODE ANN. § 29-1-5-6. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 4.2 (AM. LAW INST. 1999); ATKINSON, *supra* note 8, § 89.

[163] Although this reading of anti-revival statutes is urged by the drafters of the Restatement, it appears that no case has adopted such loose construction. See, e.g., the Pennsylvania anti-revival statute, expressly clarifying that "[o]ral republication of itself shall be ineffective to revive." 20 PA. STAT. AND CONS. STAT. ANN. § 2506; *see also In re* Estate of Melton, 272 P.3d 668, 679 (Nev. 2012) (characterizing its identical revival statute as plainly. "anti-revival" and requiring "republication or re-execution"); GERRY BEYER, 10 TEX. PRAC., TEXAS LAW OF WILLS § 37:3 n.3 (4th ed.) (such interpretation is "scarcely arguable"); ATKINSON, *supra* note 8, § 92 n.21.

Perhaps to avoid the inconsistency that exists between anti-revival and early will effect, some jurists have seriously spun the logic. One claim might be that "Will" #2 was not actually a will at all, but rather a "mere revocation by instrument." This assertion is aided by statutes that permit revocation by *either* a will *or* "an instrument executed with the same formalities as are required for a valid will,"[164] suggesting that there is some difference between the two. If so, it is not actually a later will qua will that is speaking at all (much less "early") in revoking an earlier one, but rather "an instrument" that just so happens to shoulder identical testamentary requirements. The argument is strong if it works, for I am unaware of any claim that "no *instrument* speaks until the death of its maker," only that no *will* does. One need look no further than negotiable instruments to see why that could not be so.

Close on the heels of the document/instrument split is the claim that later wills with revocation clauses have two roles, or more graphically, two physical parts holding two distinct voices: a revocation clause holding an instrumental, revocatory one effective upon execution, and the remainder holding a deferred and testamentary one effective upon death. This is the sort of contortion that permits the dissent in cases like *Timberlake v. State-Planters Bank of Commerce & Trusts*[165] to argue that "[t]he act declaring the intention to revoke is the essence and heart of the revocation process, an act which [aside from the rest of the will] has immediate effect at the time of commission"[166]; or reiterate that a revocation might not be "'a subsidiary conditional exercise of power,' but an independent subsequent substantive act without reference to the character of the instrument employed"[167]; or fuss with the essentialism of a so-called "declaratory" revocation versus a "testamentary" one.[168] These linguistic riddles do discharge the paradox, but through tortured, anguished strokes.[169]

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[164] *See, e.g.*, W. VA. CODE ANN. § 41-1-7 ("No will or codicil . . . shall be revoked, unless under [revocation by divorce], or by a subsequent will or codicil, *or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed*, or by the testator['s or a proxy's physical act]." (emphasis added)); 33 R.I. GEN. LAWS ANN. § 33-5-10 (similar).

[165] Timberlake v. State-Planters Bank of Commerce & Trs. 115 S.E.2d 39, 44 (Va. 1960) (Spratley, J., dissenting).

[166] *Id.* at 48.

[167] *Id.* at 46.

[168] *Id.* at 41–42.

[169] Although at least at that time, coming up short. *See In re* Estate of Burleson, 738 A.2d 1199, 1201 (D.C. 1999) (rejecting principle expressed by majority in *Timberlake* to hold that execution of subsequent will revoked prior will, even though subsequent will was presumptively revoked by physical act).

The difficulty with both propositions, i.e., that written revocations either are not "solely" wills or are not wills at all, rests with the definition of a will, which creates far more problems than it solves.

First, there is no single accepted definition of a will,[170] nor the testamentary intent that informs it.

> The courts have said again and again that the test whether or not an instrument is testamentary . . . is whether it was executed with [] testamentary intent. While this is a standard form of orthodox statement, it is in itself of little help since it does not explain what [] testamentary intent [even] is.[171]

Second, definitions are often rendered uselessly, with circuitous or vague terms. Surely there is more to a will than "a term that includes a codicil."[172] And to know that testamentary intent is "the intent to make a will" but to learn that a will is "a document executed with testamentary intent" illuminates nothing for anyone.[173] Third, although definitional treatment might intimate or state that a document must transfer something to be treated as a will,[174] such parochialism seems quaint, with most jurisdictions embracing as a will "any instrument . . . [that] disposes of [property], appoints a personal representative, conservator, guardian, or trustee, revokes or revises an earlier executed testamentary instrument, or encompasses any one or

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[170] "There is often false security in attempts at precise definitions." ATKINSON, *supra* note 8, § 1.

[171] 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 5.6 (2003).

[172] *See, e.g.*, DEL. CODE ANN. tit. 1, § 302(22) (defining will as a last will and testament including a codicil); MISS. CODE ANN. § 1-3-59 (noting that the term "will" includes codicils). *See generally* Guzman, *Intents and Purposes*, *supra* note 29, at 322–30 (discussing the awkwardness of requiring, through harmless error, "clear and convincing evidence" of an ill-defined intent to create an ill-defined product).

[173] *Compare, e.g.*, Edmundson v. Est. of Fountain, 189 S.W.3d 427, 430 (Ark. 2004) (document found defective for "lack[ing] the required *animus testandi* or intent to make a will"), *and* Kidd v. Gunter, 551 S.E.2d 646, 648 (Va. 2001) ("[T]here must be a concurrence of the *animus testandi* and the *animus signandi*—that is, the intention to make a will and the intention to sign the instrument as and for a will." (citing Hamlet v. Hamlet, 32 S.E.2d 729, 732 (Va. 1945))), *with* S.D. CODIFIED LAWS § 29A-1-201(52) ("'Will' means an instrument . . . executed with testamentary intent . . . ."), *and In re* Daniel J. Rosenbaum Tr., No. 81213, 2003 WL 1849141, at *2 (Ohio Ct. App. Apr. 10, 2003) ("Although there is no specific statutory definition of a 'will,' . . . it . . . 'must . . . by its language demonstrate, at the minimum, a testamentary intent, i.e., a disposition of property to take effect only at death.'" (quoting *In re* Estate of Ike, 454 N.E.2d 577, 579 (Ohio Ct. App. 1982))).

[174] *See, e.g.*, *In re* Estate of Allen, 301 S.W.3d 923, 927 (Tex. Ct. App. 2009) (testamentary intent depends on the maker's intention to create an irrevocable disposition of property); Mallory v. Mallory, 862 S.W.2d 879, 881 (Ky. 1993) ("[E]xpression of testamentary intent . . . require[s] 1) a disposing of property 2) which takes effect after death." (citing Simon v. Wildt, 84 Ky. 157 (1886))); Gushwa v. Hunt, 197 P.3d 1, 3–5 (N.M. 2008) (assuming that no instrument is "testamentary" unless making a positive disposition of property upon death).

more of such objects or purposes."[175] Thus, wills need not transfer anything to earn their title.

The final point may be the most visceral. Most rights can be exercised through both non-action and action; many non-acts can be viewed as status quo affirmation.[176] Even were the definition of a will to demand some affirmative transfer component, a document that does nothing more than "remove" is still the flip side of one that "gives." For example, partial revocation simultaneously "gives" to its residuary,[177] and total revocation simultaneously "gives" to either earlier will beneficiaries through revival, or intestate heirs through intestacy.

(3) Intent-Based Revival Is Pro-Will Speech

If automatic revival (nowhere accepted) promotes the silence of wills, and anti-revival (sometimes accepted) rejects the silence of wills, it may seem that the middle ground, where revival turns on evidenced intent, does neither. Nevertheless, it too cuts against the traditional maxim and instead allows all wills to speak early.

Intent-based revival affords significance to both revoked wills. It does so by testing the provisions of each against the other to discern, circumstantially, whether the later will was revoked with or without the intent to revive, or at least generate a presumption on point This review is admittedly post-hoc, rather than one giving immediate-upon-execution effect to Will #2 so as to "forever revoke" Will #1. But it again reveals how the very explication of some earlier-stated intent, as is revealed when one's will becomes "a Will," might answer in response to a later search for what the decedent may have intended, and when.[178] What is more, in jurisdictions where no presumption to revive is ever indulged, the status quo (unless altered through direct evidence) will be the same as anti-revival: the later will, although itself revoked before the testator's death, will be deemed to have revoked the earlier will just as soon as the later was executed.

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[175] *See, e.g.*, NEB. REV. STAT. ANN. § 30-2209(53).

[176] For example, a decision to remain silent can be viewed as an exercise of expression, with the actor determining against a given time, place, or manner of speech.

[177] Which partly explains some jurisdictions' lingering squeamishness with permitting partial revocation by physical act. *See supra* note 130 and accompanying text.

[178] For example, the Uniform Probate Code presumes that where Will #2 (which had completely revoked Will #1) is itself revoked by act, no presumed intent to revive will arise, but where Will #2 had but partially revoked Will #1, the opposite will be true. It is impossible to assess the effect of a later will upon an earlier one without allowing the earlier one to reveal what its maker had "then" intended. *See, e.g.*, UNIF. PROBATE CODE § 2-509 (amended 2010); COLO. REV. STAT. ANN. § 15-11-509.

In all states but perhaps two, then, wills can be quite voluble even before they've matured. The point is made plain by the correlative recognition that this is so even if the testator revoked that second will a split second after having made it with no second thought.[179] Indeed, this reality may be even more stark, depending on the extent to which such later-and-revoking-but-themselves-revoked wills ever end up being tested for testamentary compliance.[180] If the original of that later will has been itself revoked via obliteration or destruction, or where its revocation arises through lost will presumptions, it will no longer be available to prove due execution.[181]

All of this leads to three surprising outcomes if the will-silence maxim deserves the faith it claims. First, not only might a valid but revoked will legally speak well before death to revoke those made prior, but so might an *invalid* (but "revoked") mere attempt at a will, and so too might an invalid and no longer existing attempt at a will. It is one thing for wills to "speak" early, but another for destroyed documents that may have erroneously thought they were wills to do so as well. Second, if the later will is never itself offered for probate, it will never be tested on influence or capacity grounds. This matters. If the later and technically valid will were to have collapsed under challenge, it would never have revoked the earlier will to start with, and revival would not even be raised. Finally, although all jurisdictions either disallow revival completely or permit it upon a sufficient evidentiary showing (either way, permitting the later will to speak "early"), enforcement of those rules is more stated than real if neither the best nor even second-best evidence of that will or its interpretation—the document itself, and its maker—remain in existence. Thus, the earlier will would be speaking, but only because of mistake.

IV. TO LOOK AROUND WITH WONDER

"No will speaks until the death of its maker." One could be sanguine if not indulgent about both the saying and its

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179 Practically, however, the testator might achieve the desired revival effect. Were the existence of Will #2 either unknown, forgotten, or concealed, there would be no proof of the revocation of Will #1 to begin with, allowing its probate to proceed without issue.

180 Although variations exist, attested wills generally demand a formed and written testamentary intent along with testator and witnesses' signatures. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 (AM. LAW INST. 1999). Where recognized, holographic wills need not be witnessed. *See generally id.* § 3.2 cmt. a; MCGOVERN ET AL., *supra* note 94, § 3.4 (discussing the requirements of holographic wills).

181 It is possible that a copy will work. *See, e.g.*, MCGOVERN ET AL., *supra* note 94, at 197.

overstatement, particularly if it works well 96 percent of the time. Few would dispute the tautology: if wills don't convey property, they won't speak until death as conveyance; if they can't speak until death as conveyance, expectancies cannot be property.[182] Besides, sayings are not edicts, although they might sometimes look like it. No one is jailed for turning in late, or not being early to rise.

But apart from some "so what" differential, reflexive acceptance of the assertion that wills cannot presently speak misses the point. Even if infrequent, trying to square a circle, or pretending all circles are squares, suggests that something is amiss about one or the other. Discerning why the maxim came to be (and stays) might make starker and more revealing the cause and effect of its "breach." Along with providing insight over past theoretical constructs, doing so could offer prediction going forward. Perhaps most importantly given the rapidity with which those familiar constructs[183] are being reassessed, revisiting the saying encourages fresh looks—even over such basics as property—through which to test tension and change.

A. Order in Structure

Order is valued, with colonial and post-colonial America seeming to have internalized a western European preoccupation with marking chaos so as to subdue and then manage it. The tendency, understandable, is structurally reinforced through either/or thinking, linguistic reification, and fences imagined and real. Ours is a system of this versus "thatness," and law has not been immune.[184]

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[182] This again sidesteps whether expectancies could be a form of property, which might not be as farfetched a question as it might initially seem.

[183] Electronic wills challenge what is a writing. Elder abuse challenges who should be heirs. Reproductive techniques challenge who should be children just as living patterns challenge who should be spouses. To some extent, artificial intelligence is challenging everything.

[184] This view is illuminated through the work of Roman legal theorist Vigelius, which profoundly affected much of modern jurisprudence:

> What is most striking and most significant in Vigelius's work . . . was his organization of the whole of the law, proceeding from general to specific—dividing it first into public and private law, subdividing public law into legislative, executive, and judicial activities, subdividing private law into the law of persons, the law of property, the law of inheritance, and the law of obligations (contracts, torts, and unjust enrichment), and then systematizing the specific rules of each branch. These remain to this day basic "topics" of Western legal science.

Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe & the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 SYRACUSE J. INT'L L. & COM. 1, 24 (1994). Strains of this tendency exist within legal theory

Sometimes the framing is left unsaid. For example, if due process protects "life, liberty, *or* property,"[185] it would appear that distinctions exist between them. And as only "private" property is protected from an uncompensated taking,[186] it must differ from the rest of its known varietals. As often, however, division is urged explicitly, presented as inviolate divide: persons can never be property, life is the reverse of death, then is not now is not later, and deeds do not equal wills. These propositions are complementary to the pre-death silence of wills, where those who execute them will have given up nothing, retaining existence and control. Like the metaphors, fences, and maxims that reinforce them, categoricals make things more efficient for those who make the law, as well as more comforting and palatable for those who wish to follow it.[187]

But as much as the law might assert them, boundaries can be porous. Lines are crossed unknowingly, apologetically, surreptitiously, or with disregard, in different ways and at different points and places, sometimes justifiably, sometimes not. Locating any single division, such as where expectancies end and property starts, is trying enough on its own. But that task is compounded through the existentialism of wills, which question what it even means to be alive and within an odd temporal construct blurring a constantly changing "now" from then and later. It turns out that as common as will-making is, it is also uniquely transgressive, which may partly explain the allure of soothing sayings that reinforce an "all is clear and well" mentality.

Where wills are involved, it is difficult to sort what is A's versus B's (or both of theirs over all others) without generating

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at large, as through precedent, stare decisis, and respect for the Rule of Law. In many ways, this further entrenches categories by adding "asked and answered" to their creation. "The best place to seek examples of reification in the legal system is within the concepts harbored by those who create and administer the laws, namely legislators and judges." Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CAL. INTERDISC. L.J. 401, 417 (2000).

185 U.S. CONST. amend. V; amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

186 U.S. CONST. amend. V; amend. XIV, § 1 ("[N]or shall private property be taken for public use without just compensation."). *See generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886 (2000) (assessing as incomplete and incoherent attempts to define property within constitutional jurisprudence).

187 The allure of distinctions is obvious. For example, an efficient property/non-property divide is handy, cheap, and easy, replacing back-end time and effort with a quick and rough early sort. As such, it is easier to resolve constitutional inquiry over whether a given regulation violated due process and/or effected a taking by objectively finding that no property (private or otherwise) existed to start with than by engaging the more nuanced constitutional analysis. Even better (at least from the perspective of judicial economy) would be a lay person's determination that no rights had existed to be violated, thus no suit even existed to be brought. Similar arguments can be made about any sort of formalism. It easier to say that a will is invalid than to try to discern what it means.

some shared perspective on property. Perhaps the easiest to be said is that as a legal construct, property is not persons nor places or things, but the legal relationship between them.[188] Reversed, it might be that along with such associated issues as standing, revocation, or the point at which a will "speaks," the property label is merely the ultimate conclusion that law is willing to draw about who has what rights relative to whom, over what, and when, in what context. Such positivism should not suggest that law is unmindful of its operational sphere; that it ignores, for example, the role of predictive stability for labor, incentive, investment, and the avoidance of discord or dispute, or that it can simply "de-property" things to avoid certain undesirable outcomes, e.g., the payment of just compensation. It is, however, meant to remind us that law can be adaptive (or fickle). The comfort we may seek in categories and sayings might be misplaced and naïve, but what is more, it may stultify change.

The challenges posed by such a relational, rights-based definition are abstraction and fluidity—two things that belie clear divides. Consider the older conception of property as things rather than rights.[189] That limiting principle drove all manner of downstream choice, including inability to envision third-party future interests, or easements in strangers to grants.[190] The "scientific turn" toward a rights-based approach, reinforced

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[188] Not to say that the law's arrival there has been easy, or without its own controversies. *See, e.g.*, M. Honoré, Ownership, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 131–32 (A.G. Guest ed., 1961) (identifying the traditional incidents of ownership, and accepting choses in action as "something that can be owned"); Wesley Newfield Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (structuring property as relationships rooted in rights); Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939) (recapitulating the property rights identified by theorist Leon Duguit); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996); Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1943 (1997); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360 (2001).

[189] *See, e.g.*, Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1555–59 (1982).

[190] The difficulty rested mainly with livery (or "delivery") of seisin, itself "a hazy concept typically described as reified possession." Gerard Michael D'Emilio, *Frontier Feudalism: Agrarian Populism Meets Future Interest Arcana in the Land of Manifest Destiny*, 70 OKLA. L. REV. 943, 984 n.24 (2018). Through livery between grantor and grantee, title transfer was further reifying through passage of a clod of dirt or twig. Third parties, such as executory interest holders or other "strangers to the grant," could not be conceived as taking part in it. More modern expressions of the idea occasionally arise, as where the claim is made that no gift of a chattel may be made without its physical transfer. *See, e.g.*, Gruen v. Gruen, 496 N.E.2d 869, 874 (N.Y. 1986). Too strong a belief in the physical res would have dampened the development of all manner of concepts relying on anything virtual, constructive, or symbolic.

through its "bundle of sticks," enabled law to envision more choice with precision, and implement choices then made.[191]

To return to the speech of wills: whether stepping over ostensibly clear divides by listening (in part) to them "early" is processed as abnormality[192] or harbinger[193] might similarly channel perceptions over whether boundary lines—including what wills are versus what they do—should be moved, retrenched, or removed. It is not always easy to tell. But the challenge brings opportunity, such as to anticipate where law might be heading, alter the course it is taking, or re-appreciate choices in place.[194]

One hypothesis over what prompted the maxim might reveal that it is not set to stone. In post-Conquest England, testamentary land transfer was not universally recognized until the Statute of Wills was passed in 1540. Thereafter, wills held quasi-conveyant status, as revealed by (1) the need to secure permission from the heir apparent before devising land to another,[195] and (2) the inoperability of a will to transfer land acquired after the will's execution.[196] It may therefore be that in deferring will speech until death, the maxim owes in part to a desire to legitimize the devise of after-acquired property.[197] If so,

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[191] *See supra* note 188.

[192] As where tortious interference with an expectancy is rejected as a cause of action for "conflict with probate law." *See* Archer v. Anderson, 556 S.W.3d 228, 229 (Tex. 2018). The court continued, quoting extensively from Professor Goldberg and Sitkoff's influential scholarship on point.

> [Tortious Interference with an Expectancy] is conceptually and practically unsound. . . . [I]t is deeply problematic from the perspectives of both inheritance law and tort law. It undermines the core principle of freedom of disposition that undergirds American inheritance law. It invites circumvention of principled policies encoded in the specialized rules of procedure applicable in inheritance disputes. In many cases, it has displaced venerable and better-fitting causes of action for equitable relief. It has a derivative structure that violates the settled principle that torts identify and vindicate rights personal to the plaintiff. . . . [T]he emergence of the interference-with-inheritance tort is symptomatic of two related and unhealthy tendencies in modern legal thought: the forgetting of restitution and equitable remedies, and the treatment of tort as an unstructured delegation of power to courts to impose liability whenever doing so promises to deter antisocial conduct or compensate victims of such conduct.

Id. at 233–34 (quoting Goldberg & Sitkoff, *supra* note 126, at 335–36).

[193] *See, e.g.*, *In re* Estate of Brock, 536 S.W.3d 409 (Tenn. 2017) (disavowing theory expressed in prominent precedent refusing to stand to earlier will beneficiaries disinherited by later wills).

[194] Hockey great Wayne Gretzky reputedly advises to skate where the puck is headed, not where it has been. RICHARD E. SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE xviii (2012). If I might extend the metaphor, it would also be helpful to discern how to change its direction or speed, or stop it in its tracks.

[195] *See supra* note 13 and accompanying text.

[196] *See supra* notes 13 & 58 and accompanying text.

[197] This would not be a problem for the then-common death-bed will, given that little time would intervene between execution and death. But as wills began becoming more

perhaps the maxim as originally conceived spoke a bit less to when wills should speak than to what they could or should be read to cover. This moves observers away from formalism (with the admitted plusses it yields) toward the messier world of possibility, but the promise it holds for intent.

B. Possibility in Chaos

The mere suggestion that wills effect change before the death of their makers seems like heresy, particularly if "effecting change" is read all-in to mean "convey property."[198] Such thinking, however, ignores the nuance of intra-point transition. Property law already recognizes that rights are relative, divisible, and non-absolute, as well as contextually driven. As such, it is not such a stretch to imagine some relative, divisible, and contextual "right"[199] in some beneficiary that, akin to a license, would yield to testator's control. Call it what you will, the right would need not capture everything. The suggestion would shift assessment from deterministic, extant rules to what might be achieved, and how.

For example, perhaps wills upon drafting could immediately confer standing on some or all whom they name, at least for the "time being," i.e., unless and until revoked.[200] What if beneficiaries under wills were permitted routinely to challenge the conduct of guardians of the person or property of the testator? Or sue alleged bad actors or infringers to the testator's rights? What would happen were merely executing a will affecting the subject property thought to sever a joint tenancy with rights of survivorship, on the theory that so doing constituted an act "inconsistent with the continuation of" the survivorship right? What might result by giving beneficiaries a say in how their "sources" deployed assets?

None of these questions should be taken to endorse doing so. For example, it may be that on balance, finding severance upon will execution would be a terrible idea. But that is not the point. Postulating some particular outcome is far less about finding answers than inviting possibility and the space for alternate construction. This is so even where the result is rededication to the

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commonplace and tied as much to asset planning as a step toward securing salvation, they began being drafted earlier and unconnected to death, in turn rendering the need to consider after acquired property more acute. *See* Hirsch, *supra* note 53, at 610.

[198] *See, e.g.*, Elizabeth M. Glazer, *Rule of (Out)law: Property's Contingent Right to Exclude*, 156 U. PA. L. REV. ONLINE 331 (2008).

[199] Dare we even say "property"? Having been given a name, the expectancy must be more than something even if it is less than everything. *See generally infra* Part I.

[200] Some might argue that that is the role for fiduciaries and other guardians, but that often ignores their role in the problem.

principles that time and maxims had initially bequeathed. There is rarely much harm in the asking.

CONCLUSION

Entire worlds live in the gaps between what was, is, and ought to be.[201] Casting or confusing one as the others holds serious consequences, particularly within language and the confines of law. Law reifies theory, which creates "a kind of infection [] that blinds people to alternative legal arrangements by 'naturalizing' the existing legal system as inevitable."[202]

When judges invoke and apply common propositions, they build precedent. The ongoing assertion of both proposition and precedent in ways that may exceed their original reach constructs deceptively stable structures (which may be the most perilous kind).[203] As that practice and consequence repeat, future courts and commentators find it ever easier to press old truisms into the service of newer and increasingly broader circumstance, and thereby ignore, minimize, miss, or even mask actual policies involved through ipse dixit glide right into "that which everyone knows." There is little pressure to fix things not perceived to be broken, and there is risk and sometimes cost in even raising concern. But time brings change whether sought or not, which could mean that today's conversations, however peculiar they might sound, would yield richer process values going forward. Perhaps law, like science, makes progress funeral by funeral,[204] and as old maxims die out, new ideas can arise.

The aphorism that "no will speaks until the death of its maker," which appears in some iteration throughout law and its literature, provides a means through which to explore the phenomena. Whether consciously employed or not, and whether expressed in the case law as dicta or not, the proliferation of its use, unchecked, may hold real practical and policy consequences by

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[201] One might analogize to the role of legal Restatements and occasional concern over its authors' alleged tendency to "abandon[] the mission of describing the law" in favor of "set[ting] forth their aspirations for what the law ought to be." Kansas v. Nebraska, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part) (citation omitted). The suggestion may be that less legislative and judicial attention is paid to that which is believed merely to restate long-vetted principles than reform them.

[202] Litowitz, *supra* note 184, at 401.

[203] *Id.* at 403. ("[R]eification is a silent and subtle phenomenon, one that is best noticed in a comparative context where we recognize the reification within our own legal system by comparing it with alternative arrangements, both real and imagined. [The recognition of reification permits one to avoid seeing] the existing legal system and legal doctrine as natural and inevitable [and permits observers to] question the system instead of blindly legitimating it.").

[204] *See* Pierre Azoulay et al., *Does Science Advance One Funeral at a Time?* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 21788, 2018).

retarding the development of more organic, creative, or nuanced responses to given sets of facts, especially when old and new(er) worlds collide. Mere maxims are not absolutes. Borne of context, their truth—even that of those most regularly, vehemently expressed—is relative to circumstance and contingent on time, place, and an array of other factors. That which "works most of the time" belies its own universality. And over time, it tends to change.

Wills do in fact speak upon execution, and about many things personal to their makers. They are, after all, speech, and moreover, of a type that has been committed to writing, then witnessed, then signed. But the intent they express has also been read in ways that generate legal outcomes. In that will execution is both intent *plus* an act—a joinder that in other legal contexts, allows for crimes to be punished or sued on as torts—perhaps that should be unsurprising. But what does surprise is the common refusal to acknowledge (or at least ignorance of) that reality, which leads to such internal theoretical inconsistencies as that wills can sometimes cut off rights but cannot create them,[205] or that words that cut off rights are not, actually, wills.[206]

Perhaps we should be forgiven inattention. Maxims and metaphors are powerful messengers with a constant (though hidden) influence.[207] Moreover, that "expectancies are not property"[208] has become so intensely ingrained and intractable that even considering the possibility of a will's early speech may have become verboten. Nevertheless, that is sad if true. Law should be as much about questions as answers. What might result were wills perceived as actual messages, holding possible legal effect and sent to a time we cannot see,[209] seems to make this question one worth asking. Their twilight existence, today, is also the future's past.

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[205] *See supra* Section III.A.1 (discussing the effect of a will on the rights of contestants).

[206] *See supra* Section III.A.2 (discussing the effects of revocation on a prior valid will).

[207] This article, for example used them, along with idioms, similes, analogies, and similar devices, repeatedly, both by design (and if I am honest, by accident). Like the air that we breathe, it might be difficult to move outside of or beyond them given how we think and communicate, and especially so if all words are mere metaphors for the things that they try to explain. This may be part of what Wittgenstein lamented when he stated that "the limits of my language mean the limits of my world . . . . We cannot think what we cannot think; so what we cannot think we cannot say either." LUDWIG WITTGENSTEIN, TRACTATUS LOGICUS PHILOSOPHICUS § 5.6.

[208] See, however, Katheleen Guzman, *Sleight Expectations* (manuscript on file with author) exploring that view of the expectancy and creating a taxonomy of its contours similar to that which exists for future interests.

[209] *See* POSTMAN, *supra* note 14, at xi ("Children are the living messages we send to a time we cannot see.").